Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. 79-203

GEORGE OCHS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

GEORGE OCHS,

Petitioner,

--vs.--

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 13, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is appended to this petition as Appendix A. It is reported at United States v. Ochs, 595 F.2d 1247 (2d Cir. 1979). The opinion of the United States District Court for the Southern District of New York is appended to this petition as Appendix B. It is reported at United States v. Ochs, 461 F.Supp. 1 (S.D.N.Y. 1978).

JURISDICTION

The jurisdiction of the Supreme Court to review the final judgment of the United States Court of Appeals for the Second Circuit is based on 28 U.S.C. § 1254(1).

ORDER DENYING PETITION FOR REHEARING AND ORDER EXTENDING TIME TO FILE PETITION FOR CERTIORARI

A timely petition for rehearing was filed with the United States Court of Appeals for the Second Circuit and denied by order entered on May 25, 1979. Thereafter, an application was

made to Associate Justice Thurgood Marshall seeking an extension of time within which defendant could timely file the within petition for certiorari. On June 19, 1979, Justice Marshall entered an order extending defendant's time to petition this Court for certiorari until July 24, 1979. The order of the Second Circuit denying rehearing is appended to this petition as Appendix C. Justice Marshall's order extending the period for filing is appended to this petition as Appendix D.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Petitioner seeks review of issues of law arising under the Fourth Amendment to the United States Constitution; under Federal Rules of Criminal Procedure 8(a), 12(b) and 14; under 18 U.S.C. § 1503; under 26 U.S.C. §§ 7201 and 7206(1); and under the Fifth Amendment to the United States Constitution. They are appended to this petition as Appendix E.

QUESTIONS PRESENTED

1. In light of United States v. Chadwick and Arkansas v. Sanders, should a warrantless search of private papers found in a briefcase during what was characterized by the police as a non-investigatory automobile inventory be upheld on the basis of Chambers v. Maroney as an investigatory search?

2. Should defendant's conviction for claiming false dependency exemptions on his income tax returns be upheld when these charges were oppressively joined in a single trial with unrelated charges of extortion?

3. Should defendant's conviction for obstruction of justice be upheld when the trial court specifically deleted the mens rea element of "corruptly" under 18 U.S.C. § 1503?

4. Was the defendant's sentence of nine years for claiming false dependency exemptions on income tax returns irrational and improperly motivated where he received lesser sentences for the more serious offenses of income tax evasion and extortion?

STATEMENT OF THE CASE

On September 5, 1975, defendant George Ochs was arrested by New York City police officers while sitting in a borrowed Cadillac automobile on a downtown Manhattan street. The arrest was based upon a B. Altman Department Store detective's claim that Ochs was associated with a stolen travelers' check cashing ring, that the arresting officers saw a "gravity knife" located on the front seat of Ochs' car, and that the arresting officers suspected that the car was stolen. The arresting officers took Ochs and a companion to the stationhouse, impounded the vehicle, and inventoried its contents pursuant to New York City Police Department standard operating procedure. After finding two briefcases on the footwells of the back seat of the car, the inventorying officers opened the briefcases, leafed through the notebooks, index cards, and ledger sheets contained inside, and then read those materials. The inventory produced no contraband, and state charges arising from the

arrest were dismissed for failure to prosecute.

The materials found in defendant's briefcase did produce, however, a federal investigation which led to a seven count indictment in October of 1977 for extortion in connection with seeking repayment of a particular loan in violation of 18 U.S.C. § 894; for obstruction of justice in attempting to influence witnesses subpoenaed to testify before the grand jury in violation of 18 U.S.C. § 1503; for failure to file an income tax return for 1974 in violation of 26 U.S.C. § 7203; and for evasion of income tax for the same year in violation of 26 U.S.C. § 7201. Three additional counts unrelated to the above but prompted by the investigation of defendant were joined in the extortion indictment for defendant's false claiming of a wife and several children in his income tax returns for the years 1971, 1972, and 1973 in violation of 26 U.S.C. § 7206(1).

After a three week trial slowed by the death of defense counsel's father shortly after the trial began, defendant was convicted on all counts

and sentenced to an aggregate term of 23 years imprisonment, nine of which were imposed for the false dependency convictions, two for income tax evasion, five for obstruction of justice, and seven for the alleged extortion.

Defendant raised numerous issues on appeal, most of which were dealt with by the extensive opinion of the Second Circuit. The appeal and circuit court opinion focused primarily on the defendant's claim that, absent a warrant, his private papers should not have been examined after his briefcase was safely in police custody following the impoundment of the vehicle in which he was arrested. The district court had upheld the search on the basis that the police were conducting a lawful inventory when they opened, leafed through, and then read the papers in defendant's briefcase. The circuit court cast aside that justification and without soliciting briefs or hearing argument on the point from either side, upheld the search as investigative but properly allowed without warrant under the authority of

Chambers v. Maroney. United States v. Chadwick was distinguished as a non-automobile case by the panel majority while a concurring opinion of Judge Meskill relied upon the Second Circuit's previous conclusion that Chadwick should not be given retroactive effect. (See United States v. Reda, 563 F.2d 510 (2d Cir. 1977).)

After the circuit court decided the case on grounds so foreign to those relied upon by the police and briefed and argued by the parties, defendant unsuccessfully petitioned for rehearing arguing that the court misperceived the effect of Chadwick on Chambers; misapplied relevant Fourth Amendment principles by upholding the search on grounds denied by the officers; and that the defendant should be accorded at least an opportunity to brief and argue the Chambers issue and at best an opportunity to develop an adequate record on the Chambers issue by a remand to the trial court.

The recent decision of this Court in Arkansas v. Sanders, ____ U.S. ____ (June 20, 1979) appears

to undermine the circuit court opinion below and require at the very least reconsideration in light of that decision. A motion seeking reconsideration in light of Sanders was filed by the defendant with the Second Circuit prior to the filing of this petition for certiorari and entertained by the circuit court but ultimately denied.*

In addition to the claim that his private papers and effects were unconstitutionally invaded by the state police and that this evidence should not have been admitted in the trial below, defendant has selected three other important questions of law which he seeks review of in this petition for certiorari. These issues arise from the failure of the trial court to sever the false dependency income tax counts from the totally

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*The Second Circuit, per Judge Friendly, directed the Government to reply to the defendant's motion for reconsideration of the denial of his petition for rehearing on July 2, 1979. The Government filed its reply on July 9, 1979 and the defendant's motion was ultimately denied without hearing or further briefing on July 20, 1979. A copy of Judge Friendly's order of July 2, 1979 is appended hereto as Appendix F to this petition.

unrelated extortion charge; the mis-instruction in the trial court's obstruction of justice charge which effectively deleted the mens rea of "corruptly"; and the irrational and improperly motivated sentence of nine years for the false dependency income tax violations when two years were meted out for the evasion itself and seven years for extortion. Defendant maintains that the sentence is internally irrational and improperly structured so that, if the seizure of the papers was upset on appeal, a substantial sentence for an offense rarely receiving a custodial disposition and certainly never receiving such a substantial punishment would be left intact.

The relevant details of these issues are developed within the arguments contained in the reasons for granting certiorari in this case.

REASONS FOR GRANTING THE WRIT

POINT I

CERTIORARI SHOULD BE GRANTED AND THE CASE SHOULD BE REMANDED TO THE CIRCUIT COURT SO THAT IT MAY BE ADJUDICATED IN CONFORMITY WITH THIS COURT'S DECISIONS IN ARKANSAS v. SANDERS and UNITED STATES v. CHADWICK.

Despite the state police's persistent justification of their actions as an automobile inventory before the district court, the circuit court balked at deciding the case "under the more limited principles of [South Dakota v.] Opperman, 428 U.S. 364 (1976)." Ochs, supra, 595 F.2d at 1255. Instead, the circuit court found that the police had probable cause to search the vehicle, substituting Chambers v. Maroney, 399 U.S. 42 (1970) for Opperman, permitting the search to occur at the stationhouse. Anticipating the defendant's arguments in his petition for rehearing, the circuit court distinguished United States v. Chadwick, 433 U.S. 1 (1977) by holding that it does "not affect the viability of Chambers on facts such as these." Ochs, 595 F.2d at 1254. Four weeks after defendant's petition for rehearing was denied, this

Court decided Arkansas v. Sanders, 47 U.S.L.W. 4783 (June 20, 1979), in order to "resolve some apparent misunderstanding as to the application of United States v. Chadwick . . . to warrantless searches of luggage seized from automobiles." Id. at 4784. In direct contradiction of the circuit court opinion herein, this Court held in Sanders that "as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places." 47 U.S.L.W. at 4786.*

Having declined to extend the Chambers exception to the warrant requirement to include luggage, this Court applied traditional Fourth Amendment doctrine in both Chadwick and Sanders to condemn warrantless searches of luggage in the absence of

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*While Sanders involved a suitcase, and Chadwick a footlocker, defendant's briefcases undoubtedly fall within the category of luggage, since they, as a common place to keep business papers and the like, are no less a "repository for personal, private effects." Sanders, supra, 49 U.S.L.W. 4783, 4786 n.9. Cf. United States v. Schlies, 582 F.2d 1166, 1170 (8th Cir. 1978) (en banc).

a genuine exigency. The present case admits the same lack of exigent circumstances to justify the warrantless search of defendant's briefcase.

The police had arrested the defendant and had placed him in a cell. They then impounded the vehicle and inventoried its contents. Upon finding the briefcases, they brought them into the stationhouse. Rather than either applying for a warrant or sealing and securing the briefcases, they opened them, and "first leafed through the papers" looking for contraband, and "then . . . read some of the papers. . . ." Ochs, supra, 595 F.2d at 1252. As in Chadwick, the defendant had no access to the searched items at the time of the search, and the search was conducted well after the initial seizure. As in Sanders, the defendant was detained and the briefcases secured. Indeed, the police conduct in opening the briefcases, then leafing through the contents in a search for contraband, and finally reading the papers, hardly bespeaks exigent circumstances.

Since the circuit court opinion misapplied this Court's principles as enunciated in Chadwick and was rendered without the benefit of Sanders, certiorari should be granted and the matter remanded to the circuit court with directions to apply the traditional and well-considered exigency analysis of those cases.*

Subpoint A

> Chadwick and Sanders condemn as constitutionally unreasonable warrantless searches of suitcases once safely in police custody in the absence of exigent circumstances. The rationale of these cases is fully applicable to the instant case involving closed briefcases containing private papers.

United States v. Chadwick, 433 U.S. 1 (1977)

articulated under what conditions the police, having

*This was the action taken shortly after Sanders was decided when this court remanded for further consideration in light of Sanders, Robbins v. California, ____ Cal. Rptr. 2d ____ (Calif. Ct. App. 1978) (refusing to apply Chadwick to automobile luggage), 47 U.S.L.W. 3825 (June 25, 1979). Alternatively, the Court may wish to grant certiorari and retain the case to decide the inventory/suitcase issue left unresolved by the circuit court's imprudent focus upon Chambers to resolve an overbroad Opperman inventory. See Point II infra.

probable cause to search a piece of luggage, can do so without a warrant. This Court's analysis was twofold. First, it rejected the Government's novel argument that luggage, like automobiles, were subject to the mobility exigency of Chambers, supra, and Carroll v. United States, 267 U.S. 132 (1925). Luggage was held to have a greater privacy interest since it is not subject to Government regulation and commonly served as a repository of personal effects rather than an instrument for transportation. 433 U.S. at 13. Furthermore, luggage was held to be sufficiently less mobile so that all danger of losing evidence before a warrant could be obtained is gone once the police have seized the luggage and reduced it to their exclusive control. 433 U.S. at 13. Second, having declined to embrace a general "mobility exception," this Court applied traditional Fourth Amendment doctrine concerning exigencies and found it lacking once the luggage was reduced to police control. 433 U.S. at 14-16.

The Government, unhappy with the result in Chadwick, has with varying success attempted to

limit Chadwick's analysis by distinguishing luggage found in automobile searches and arguing that Chadwick does not effect a Chambers search of luggage if taken from an automobile. Compare United States v. Finnegan, 568 F.2d 637 (9th Cir. 1977) (Chambers governs) with United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978) (en banc) (Chadwick governs). This Court then decided Arkansas v. Sanders, supra, to resolve the dispute and again reaffirmed its rejection of broad exigency analysis when applied to luggage.

Sanders explains Chadwick by demonstrating that the source of the searched luggage is irrelevant to the legality of the search. Of course, the mobility rationale for an immediate search is removed once the suitcase is taken from the car and reduced to exclusive police possession. The only rationale then left for treating luggage taken from a car differently from luggage taken from elsewhere is that luggage loses its expectation of privacy once placed in the car. But, as Sanders points out:

> . . . a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy that is associated with luggage taken from other locations. One is not less inclined to place private, personal possessions in a suitcase merely because the suitcase is to be carried in an automobile rather than transported by other means or temporarily checked or stored. Indeed, the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them.

47 U.S.L.W. 4783, 4786.

Since Sanders clearly indicates that seized luggage reduced to police custody does not fall within the so-called "automobile exception" to the warrant requirement, a warrantless search of luggage even from an automobile can only be justified by exigent circumstances. Chadwick, supra; Sanders, supra, 47 U.S.L.W. at 4787. In Chadwick, exigent circumstances were absent since the police had seized the item searched one and one-half hours before the search and had removed it from the vicinity of the arrestee to the Boston Federal building. In Sanders, the court stated that exigent circumstances were required, and that:

> Where . . . the police, without endangering themselves or risking loss of evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after individual judicial approval has been obtained.

Id.

Although probable cause to search the defendant's automobile or briefcases was never litigated at the suppression hearing (see Point II, Subpoint B, infra), that issue need not be reached here, since, even if the police had probable cause, they lacked the necessary exigent circumstances justifying the warrantless search of the briefcases. The briefcases were not found until the defendant had been locked in a cell and the car had been impounded and inventoried. Indeed, the stationhouse search of the briefcases is identical to the Chadwick footlocker search at the Boston Federal building. Certainly, the police were less threatened with immediate harm or loss of evidence than in Sanders, where the illegal search was conducted on the street. 47 U.S.L.W. at 4784.

The circuit court opinion below suggested two circumstances which, in addition to the automobile, would further distinguish defendant's case from Chadwick. Ochs, supra, 575 F.2d at 1255. First, it noted that defendant's briefcases were not locked. The Sanders court found that this circumstance had no effect on the luggage's "fundamental character as a repository for personal, private effects." 47 U.S.L.W. 4783 at 4786 n.9. Second, the circuit court found that the possibility that the owner [the person from whom defendant had borrowed the car] might arrive at the station and demand the return of his car constituted an exigent circumstance. This contention ignored the state's greater possessory interest in the items as evidence of a crime, an interest which would undoubtedly have allowed the police to retain the items until a warrant was obtained. Cf. Mincey v. Arizona, 437 U.S. 385 (1978), where this Court rejected a murder scene exception to the warrant requirement but implicitly acknowledged the State's right to seize and secure the premises until a

search warrant could be sought and issued. Id. at 394; Zurcher v. Stanford Daily, 436 U.S. 547 (1978), where this Court upheld the use of a warrant to seize items in the possession of a third party not suspected of criminal activity.* Also, the circuit court's reliance on the Chambers language equating the privacy intrusions of a car search and a car seizure, 595 F.2d at 1254, is misplaced since, as discussed above, the interior of luggage has a greater expectation of privacy than does the interior of a car, Sanders, supra, 47 U.S.L.W. 4783, 4787 n.14, and since the Chambers equation of seizure with search of cars has been explained as limited to accommodating the police in dealing with vehicles which present more serious problems of safekeeping than luggage. Id.

The police never suggested, nor could the facts have warranted, any concern about the safe-

*Lowe v. Caldwell, 367 F. Supp. 46, 53 n.11 (S.D. Ga. 1973), cited by the circuit court, concerns only police convenience and has no bearing on the police right to seize and hold as evidence belongings of third parties.

keeping of the briefcases until a warrant could be sought. There was no suspicion that a bomb or explosive was in the briefcase or that the evidence sought would disintegrate or otherwise disappear if an immediate search was not conducted. Even after the officers opened the briefcases and found records therein, they continued a second-level search by carefully reading through all of the papers rather than sealing the cases and asking leave of a disinterested magistrate for constitutional authority to do so. Accordingly, with no genuine exigency to excuse the failure to obtain a warrant, the warrantless search of the private papers in defendant's briefcases is a classic violation of defendant's constitutionally protected right of privacy in those papers.

Subpoint B

Chadwick and Sanders constitute a traditional application of exigency analysis under settled Fourth Amendment doctrine. The failure of the Court to extend a Carroll or Chambers warrantless search to luggage which has been safely reduced to police custody thus presents no retroactivity issue.

Judge Meskill in his concurring opinion thought that Chadwick might well require suppression of the evidence and chose to rely upon the Second Circuit's conclusion that the teaching of Chadwick was not retroactively applicable to the search in the instant case. 595 F.2d at 1263-64. At that time several circuit courts had so ruled but this Court applied the analysis of Chadwick to pre-Chadwick facts in Sanders without even mentioning the doctrine of retroactivity. This Court's failure to discuss retroactivity in Sanders is easily explicable: in rejecting the Government's effort in Chadwick to expand the exigency exception to the warrant requirement, the Court had not announced any "new" doctrine--no matter how disappointing the rules re-affirmed might have been to police or

courts which had misunderstood the exigency rationale of cases such as Carroll and Chambers.

Both Chadwick and Sanders rejected novel Fourth Amendment principles argued by the Government and applied traditional exigency analyses; hence, neither case presents any issue of retroactivity under United States v. Peltier, 422 U.S. 531 (1975). In Chadwick, the Government attempted to develop a general "mobility" exception to the warrant requirement so as to include luggage. That endeavor being frustrated, in Sanders it tried to permit movable luggage to be searched because it was removed from a vehicle, thus invoking the so-called "automobile exception" it had failed to invoke in Chadwick since the footlocker had only been momentarily placed in the vehicle's trunk in that case. After rejecting such novel and tenuous arguments, this Court did not reduce the boundaries of reasonableness within which the police operate, but merely applied the wisdom of its precedents to the cases at hand.

In rejecting the application of the exception to movable luggage, the Chadwick court recognized that ". . . in this area, we do not write on a clean slate." 433 U.S. at 9. It then based its decision that luggage possessed the full protection of the warrant requirement on a line of search and seizure cases starting with Ex parte Jackson, 96 U.S. 727 (1878) and leading to Preston v. United States, 376 U.S. 364 (1964). Chadwick, supra, 433 U.S. at 14-16. In Sanders, this Court similarly recognized that no new Fourth Amendment protection was being created when it stated that "[w]e . . . find no justification for the extension of Carroll and its progeny to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police." 47 U.S.L.W. at 4787.

This Court has so far treated summarily cases sent to it for review that are inconsistent with Chadwick and Sanders. Thus, in United States v. Schlies, 433 U.S. 905 (1977), an Eighth Circuit case involving pre-Chadwick facts was remanded for

reconsideration in light of Chadwick. Shortly after Sanders this Court vacated and remanded another pre-Chadwick case for reconsideration in light of Sanders. Robbins v. California, 47 U.S.L.W. 3825 (June 25, 1979). Had this Court thought important retroactivity questions were raised by either Chadwick or Sanders, it would have been easy to instead have granted certiorari in Schlies or Robbins. Instead, on the same day it remanded Robbins this Court denied review in United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978) (en banc), cert. denied, 47 U.S.L.W. 3825 (June 25, 1979) where the Eighth Circuit, sitting en banc, had applied Chadwick to pre-Chadwick facts following this Court's remand order in Schlies, supra. In Schlies, the Eighth Circuit after the remand from this Court for further consideration in light of Chadwick vacated a panel decision and suppressed a warrantless search on Chadwick grounds by concluding that no retroactivity question was properly presented and that the panel opinion had misapplied prior doctrine of this Court:

> This case does not present a question of retroactivity. . . . Chadwick announces no new constitutional doctrine, nor does it broaden any existing exclusionary rule. All the Court did was to hold that warrantless searches of luggage absent an exigency are an invasion of a "legitimate privacy interest" and cannot be justified under any of the long established exceptions to the Fourth Amendment warrant requirement.

582 F.2d 1166, 1174 (8th Cir. 1978) (en banc). See also United States v. Diggs, 569 F.2d 1264 (3d Cir. 1977), applying Chadwick to pre-Chadwick facts without mention of any retroactivity problem; and United States v. Ester, 442 F. Supp. 736 (S.D. N.Y. 1977).

Before this Court's dispositions in Schlies, Sanders, and Robbins, four circuit courts had held Chadwick non-retroactive. Reda, supra; United States v. Choate, 576 F.2d 165, 182 n.20 (9th Cir.), cert. den., ____ U.S. ____ (1978); United States v. Berry, 571 F.2d 2 (7th Cir. 1978); United States v. Montgomery, 558 F.2d 311 (5th Cir. 1977). Their decisions were based on a finding under Peltier, supra, of good faith reliance on judicial precedent.

However, no precedent of this Court supports the extension of Chambers so far as to include the search of luggage safely removed from a vehicle and reduced to police control. Furthermore, the judicial consensus found by the circuit courts nowhere approaches that upon which this Court based its decision in Peltier. 422 U.S. 540-41 nn.8-11. Indeed, the state of the law was at best controversial since this Court's opinion in Chadwick itself affirmed both the district court and the circuit court. United States v. Chadwick, 393 F. Supp. 763 (D. Mass. 1975), aff'd, 532 F.2d 773 (1st Cir. 1976), aff'd, 433 U.S. 1 (1977). In light of their decision prior to this Court's recent dispositions of cases presenting factual situations similar to Chadwick, and considering this Court's heavy reliance on its precedents to resolve the controversy raised by Chadwick as applied to the Sanders automobile context, the circuit court opinions relying on Peltier to limit Chadwick's applicability must be regarded as

wrongly decided.*

Certiorari should be granted and this case remanded so that the principles re-affirmed in Chadwick and Sanders can be fully applied to the case at hand. Alternatively, certiorari should be granted so this Court can resolve all doubts about the application of the long-standing principles relied upon in Chadwick and Sanders to cases involving pre-Chadwick facts.

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*This Court's recent decision in Michigan v. DeFillippo, 47 U.S.L.W. 4805 (June 5, 1979), refusing to apply the exclusionary rule to evidence obtained during a "good faith" arrest made under a statute later declared unconstitutional, should not affect the analysis here. Statutes are fundamentally different from lower court opinions. Statutes represent an act of a coordinate branch of Government presumptively entitled to constitutional validity; they are uniform throughout the jurisdiction and their knowledge by the police can be reasonably presumed. Lower federal court opinions often conflict and represent the litigational process by which constitutional rules are ultimately fashioned by this Court; and since they are diverse and not as well published, the police cannot easily familiarize themselves with them or resolve the conflicts between them.

POINT II

CERTIORARI SHOULD BE GRANTED SO THAT RESTRICTIONS MAY BE ARTICULATED BY THIS COURT TO PROTECT PRIVATE PAPERS AND EFFECTS FROM UNREASONABLE SEARCHES AND SEIZURES WHEN BRIEFCASES OR LUGGAGE IS FOUND IN AN IMPOUNDED VEHICLE.

At the suppression hearing, the police persistently justified their conduct in opening the defendant's briefcases and reading their contents as part of an automobile inventory conducted pursuant to standard New York Police Department operating procedure. The trial court originally upheld the briefcase search as an inventory in its memorandum decision, and then, in its full opinion, justified it as incident to an arrest once the briefcases were found pursuant to the car inventory. On appeal, the parties briefed and argued only the inventory justification. The circuit court similarly deviated from the justification offered by the police and upheld the search as within the authority of Chambers. Not only did the circuit court fail to apply the appropriate constitutional doctrine in its Chambers analysis,

Point I supra, but it also erroneously changed the justification for the search. As such, the inventory rationale stands as the sole basis for upholding the search. Certiorari should be granted so that this Court can resolve conflict among the circuit and State courts whether an automobile inventory's scope includes opening latched briefcases and reading the papers contained therein.

Subpoint A

Briefcases or luggage found in a vehicle which has been impounded should not be opened absent danger to the police and the private papers contained therein should never be read pursuant to an inventory.

New York City police officers conducted a warrantless search of the defendant's briefcases under the guise that it was merely part of an inventory of defendant's car and its contents. Inventory searches were most recently examined by this Court in South Dakota v. Opperman, 428 U.S. 364 (1976). In Opperman, the contents of an automobile were inventoried according to standard police procedure in order to (1) protect the

arrestee from loss of valuables; (2) protect the police from claims of loss by arrestee; and (3) protect the police from any potential danger posed by the automobile's contents. Id. at 369; note, 60 Marq. L. Rev. 569, 573 (1977). In endorsing a "protective inventory" this Court was careful to limit its holding to "automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents (emphasis added)." 428 U.S. at 373. Pursuant to this cautionary note, the Court held that for an inventory to be lawful it could not be "a pretext concealing an investigatory police motive." Id. at 376, 60 Marq. L. Rev. at 578, Comment, 38 Ohio St. L.J. 177, 192-193 (1977). In a concurring opinion, Justice Powell, the majority's fifth vote, clarified the law of the Fourth Amendment with respect to inventory searches saying, "upholding searches of this type provides no general license for the police to examine all the contents of such automobiles." 428 U.S. at 380. Justice Powell went on to note:

> As part of their inventory search the police may discover materials such as letters or checkbooks that "touch upon intimate areas of an individual's personal affairs," and "reveal much about a person's activities, associations, and beliefs." In this case the police found, inter alia, "miscellaneous papers," a checkbook, an installment loan book, and a social security status card. Record 77. There is, however, no evidence in the record that in carrying out their established inventory duties the Vermillion police do other than search for and remove for storage such property without examining its contents. (emphasis added).

Id. at n.7 (citations omitted). Justice Marshall, dissenting, further stated:

> Mr. Justice Powell observes that the police would not be justified in sifting through papers secured under the procedure employed here. I agree with this, and I note that the Court's opinion does not authorize the inspection of suitcases, boxes or other containers which might themselves be sealed, removed and secured without further intrusion. (Citations omitted; emphasis supplied.)

Id. at 389, n.6.

This Court's recent decision in Sanders fully supports the position taken by Justices Powell and Marshall. Sanders not only recognizes

a greater expectation of privacy in luggage as a "repository for personal effects," 47 U.S.L.W. at 4784 n.3, but it also recognizes that this Court's decisions to date have only permitted the warrantless intrusions into "some integral part of the automobile." 47 U.S.L.W. at 4786, citing Opperman, supra, 428 U.S. at 366 (glove compartment); Texas v. White, 423 U.S. 67, 68 (1975) (passenger compartment); Cady v. Dombrowski, 413 U.S. 433, 437 (1973) (trunk); Chambers, supra, 399 U.S. at 44 (concealed compartment under the dashboard); Carroll, supra, 267 U.S. at 136 (behind the upholstery of the seats).

Sanders, furthermore, recognizes that a constitutional requirement requiring police to seize and hold vehicles pending a warrant has not been established because not all police departments throughout the country are equipped with the resources necessary to impound automobiles until a warrant is obtained. 47 U.S.L.W. at 4787 n.14. However, even small police departments are not likely to suffer a similar burden in securing

luggage. Id. Indeed, the better practice should be for the police, when finding items such as briefcases, to mark and seal them, and put them in storage without further intrusive examination. Opperman, 428 U.S. at 380 n.7, 389 n.6; Comment, 22 S. Dak. L. Rev. 142, 157-58 (1977).

The facts here unmistakenly indicate that the police did not limit their search of defendant's car, briefcases and personal papers to the protective goals of an inventory as recognized in Opperman. This is not to suggest that the regulations of the New York City Police Department concerning the inventory of automobiles are unconstitutional. Defendant concedes the validity of any police regulations governing the inventorying of automobiles as long as they are reasonably limited to the protective purposes endorsed in Opperman. But a police inventory procedure must be narrowly limited to protectively securing the items inventoried and not broadly directed at gathering incriminatory evidence. 428 U.S. at 373; 38 Ohio St. L.J., supra, at 201. By opening

briefcases which could have been guarded while a warrant was obtained, and, a fortiori, could have been guarded while a claim of ownership was asserted, the police here did not confine themselves to the protective purposes of a true inventory.

Although the inventory rationale as articulated in Opperman would appear clearly to limit its scope so as to protect the privacy interests found in briefcases and other pieces of luggage, the Federal and State courts have split on this issue. Some restrict the scope of the inventory, e.g., United States v. Edwards, 577 F.2d 883, 894-95 (8th Cir. 1978) (car trunk and panel box can be searched but car cannot be torn apart); United States v. Chadwick, supra, 393 F. Supp. at 776-77 (police need not break into a locked footlocker to protect selves against property claims); People v. Denman, 19 Cal. App. 3d 632, 97 Cal. Rptr. 23 (1971) and Mozzetti v. Superior Court, 4 Cal.3d 699, 94 Cal. Rptr. 412, 484 P.2d 84 (1971) (closed luggage beyond scope of car inventory); People v. Sullivan, 292 N.Y.S.2d 37, 57 Misc.2d 208

(1968) (car inventory does not include opening briefcase and finding handgun therein); People v. Gravia, 527 P.2d 543, 185 Colo. 128 (1974) (opening zippered flight bag found in car trunk beyond inventory scope); State v. Parker, 380 A.2d 291, 153 N.J. Super. 481 (1971) (zippered satchel found in trunk beyond scope of car inventory); People v. Hamilton, 371 N.E.2d 1234, 56 Ill. App. 3d 196, 14 Ill. Dec. 181 (1978) (opening locked attache case beyond scope of car inventory); State v. Gwinn, 301 A.2d 291 (Del. 1972) (searching closed satchel beyond scope of car inventory). Others have been more permissive. United States v. McCambridge, 551 F.2d 865 (1st Cir. 1977) (stolen suitcase can be opened without a warrant); United States v. Zaicek, 519 F.2d 412 (2d Cir. 1965) (attache case taken from stolen car can be opened without a warrant); United States v.Gravitt, 484 F.2d 375, 378 (5th Cir. 1973), cert. den., 414 U.S.1135 (1974) (reasonable for police to search any container coming into their possession); United States v. Giles, 536 F.2d 136, 140 (6th Cir. 1976) (automobile inventory encompasses search of luggage

taken from trunk); State v. Walker, 579 P.2d 1091, 1098, 119 Ariz. 121 (1978) (closed suitcase within scope of automobile inventory; Chadwick inapplicable).

Judge Friendly observed in the majority opinion below that "the question whether Opperman permits inspection of sealable containers as an incident to an inventory is an open and serious one." 595 F.2d at 1256. Given the state of post-Opperman law on the reach of an inventory as it pertains to briefcases and other sealable containers, certiorari should be granted so that the privacy interest protected by this Court's recent pronouncements in Chadwick and Sanders can be applied as well in the inventory context.

Subpoint B

Where the police purport to conduct a routine inventory of an impounded vehicle and their conduct becomes unreasonably investigatory, the illegal impoundment should not be justified on the basis of what the police could have done had their motivations and analysis of the situation been different.

At the suppression hearing, the police not only made clear that their only intention behind

their actions was to conduct an inventory by asserting it on five different occasions, (1TM* 17.5 to 21.3; 2TM* 35.3-5; 40.14-16; 42.22 to 43.5; 65.3 to 66.12), but they also explicitly eschewed having any investigatory intent (2TM 42.22-23). Given such a strong statement of the searching officers' intent, the switch of justifications for the police actions make the case at hand identical to Jones v. United States, 357 U.S. 493 (1960). There, the police improperly executed a daytime search warrant by a forceful nighttime entry to search a house. After that search was held bad, the Government argued on appeal that the search could be held valid as incident to a lawful arrest. It theorized that the police had the authority to enter the dwelling in order to arrest the defendant upon probable cause that he had committed a felony, and that once having entered the house upon this jus-

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*1TM refers to the transcript of the suppression hearing proceedings on December 13, 1977.

**2TM refers to the transcript of the suppression hearing proceedings on December 20, 1977.

tification they could then have seized all contraband within plain view. The Government argued further that upon the record a "rational" inference arose that the police entered the house with the purpose of arresting the defendant. In rejecting this post facto theoretical justification of the search, this Court found that:

> The testimony of the federal officers makes clear beyond dispute that their purpose in entering was to search for distilling equipment, and not to arrest petitioner.

352 U.S. at 500 (emphasis added). This Court thus did not consider the Government's alternative theory since it was unsupported by the record.

In the present case, the police said they were conducting a mere inventory. Instead of relying upon the police motive and without the Government even urging it, the circuit court sua sponte analyzed the case upon the grounds disavowed by the officers, i.e., that they were conducting an investigatory search of the car and its contents, especially the briefcases. In comparison to this Court's finding in Jones as regards the arrest theory, it is even

less rational to infer that the police were conducting an investigation, since they denied doing so. The circuit court resolved this change of theory by simply stating without authority:

> It is of no importance that the police may have thought that their only power was to make an inventory; the test is what could be lawfully done, not what the policemen thought the source of their power to be.

595 F.2d at 1256 (emphasis added). The record in this case indicates that the police made no mistake as to their power but rather consciously pursued their power by resorting to a non-search process called an inventory.

The great disparity between an inventory and an investigatory-Chambers car search renders the circuit court's position here even more untenable than the Government's position in Jones. While probable cause to arrest and to search might be based upon some of the same facts, and while warranted searches and plain view searches both have as their objects instrumentalities or fruits of crime, the differences between an inventory and an

investigation are manifold. First, an inventory is based upon the protection of an item in police custody, while an investigation is based upon the suspicion that the evidence of a crime is located at a certain spot. Opperman, supra, 428 U.S. at 369. An inventory is consequently a per se reasonable intrusion into privacy, id. at 373, while an investigation must be justified by a finding of probable cause passed upon by a magistrate. These differences in rationales and purposes lead to the additional important difference in scope. In conducting an inventory, the police may do only what is necessary to protect the owner against pilfering and themselves against property claims, or, if unusual circumstances warrant, to find a dangerous instrumentality such as a bomb. Opperman, supra, 428 U.S. at 364; Cady v. Dombrowski, 413 U.S. 433, 443 (1973) (inventories must be conducted pursuant to standard police operating procedure to guard against unconstitutional scope). The scope of an investigation, on the other hand, depends upon the object of the search. Hence, a search for a large

item, such as a stolen car, would justify a lesser intrusion then a search for a small item, such as a stolen coin.

Such a clear difference between routine inventories and exigent searches, even though both may be accomplished without a warrant, brings the present case into the proscription this Court, per Mr. Justice Holmes, first laid down in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920):

> . . . rights . . . against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way.

Accord: Mancusi v. DeForte, 392 U.S. 364, 372 n.12 (1968). While the police, had they in fact conducted a Chambers car search, could possibly have been justified in so doing (until they located and removed the briefcases which then required a warrant to be opened), a suspect inventory cannot be upheld as a procedure disavowed by the police.

Focus on the policemen's purposes and the procedure followed is wholly consonant with Fourth Amendment doctrine enunciated by this Court. If the

exclusionary rule is to effectuate deterrence of illegal police conduct, as this Court has so heavily emphasized, Michigan v. De Fillippo, 47 U.S.L.W. 4805, 4807 n.3 (June 25, 1979), the court sanctions must be imposed based upon the actions of the police. To do so creates a clear cause and effect relationship between the wrongful act and the exclusion of evidence. On the other hand, to judicially cure unconstitutional acts by post facto analysis removes from the police consideration the constitutional limitations supposedly governing their acts.

In addressing this novel issue of law, the New Jersey Supreme Court recently said:

> The purpose of the exclusionary rule "is to deter--to compel respect for the constitutional guaranty . . . --by effectively removing the incentive to disregard it." . . . if in the present case the police were intending only a safekeeping impoundment of the Ercolano vehicle . . . the rationale of deterrence . . . compels exclusion of the evidence here seized. Saving the validity of the police action on a court-devised theory of justification would not deter future unconstitutional impoundments of vehicles or investigatory entries into vehicles without lawful warrant.

State v. Ercolano, 79 N.J. 25, 38, 397 A.2d 1062(1979). The few well-defined exceptions giving the police "familiar standards" by which to fulfill their duties, Dunaway v. New York, 47 U.S.L.W. 4635, 4639 (June 5, 1979), could openly be ignored by the police.

Permitting after the fact judicial reconstruction of events also excuses the police from their burden of justifying warrantless searches. It is axiomatic that warrantless searches are per se unreasonable and that the police must come forward and justify them. McDonald v. United States, 335 U.S. 441, 445 (1948). To permit the basis of justification to be so drastically changed creates an inquisitorial system where the police merely present facts and the defendant is at the mercy of whatever justification the court chooses.

Finally, it was manifestly unfair to affirm the conviction on grounds not presented to the Court either at the suppression hearing or on appeal. Not only was the defendant denied an opportunity to be heard, but the suppression hearing record was inadequate to support probable cause to search. The

circuit court should have at least given the defendant an opportunity to address the grounds for decision, and at best have remanded for an evidentiary hearing.

Accordingly, even if the Court were of the opinion that an investigatory search upon probable cause without warrant could lawfully have been undertaken in this case, the failure of the police to assert an investigatory purpose should bar a court from inventing it for them. Certiorari should be granted on this aspect of the case so that the Court can harmonize the exclusionary rule's operation and efficacy by relating the legality of the police conduct to their stated purposes and not to their hypothetical authority. The analysis of the circuit court below if left intact by this Court will seriously undermine the effective operation of the exclusionary rule.

POINT III

CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT CAN RESOLVE THE CONFUSION AND UNCERTAINTY BETWEEN MOTIONS ADDRESSED TO MISJOINDER UNDER F.R. Cr. P. 8 AND PREJUDICIAL JOINDER UNDER F.R. Cr. P. 14 THAT LED THE COURT BELOW TO UPHOLD AN OPPRESSIVE JOINDER OF FALSE DEPENDENCY CHARGES WITH AN UNRELATED EXTORTION CHARGE.

Prior to trial the defendant moved for severance of the income tax charges from the other charges in the indictment. Count 1 of the indictment charged extortion and Count 2 charged obstruction of justice. The remaining five counts charged various internal revenue code violations for the tax years 1971, 1972, 1973, and 1974. Defendant's motion papers specifically relied upon Federal Rules of Criminal Procedure 8 and 14 and argued that the joinder of the tax charges was unrelated to the extortion and obstruction of justice counts. The circuit court, in upholding the failure to sever, found that the tax evasion count and the extortion count were sufficiently close that the other crimes prejudice was not substantial. With respect to the false dependency

counts, the circuit court recognized that they bore no relationship whatsoever to the extortion or obstruction counts but thought the evidence thereunder sufficiently distinct to avoid prejudicial spillover in the jury's deliberation. The court did note, however, that, had defendant addressed his objection to the indictment directly under Rule 8 for misjoinder rather than complaining of prejudicial joinder under Rule 14, recent Second Circuit case law might have required a finding of error by the trial court in failing to grant relief. See 595 F.2d at 1260 n.11.* The circuit court's reference to the defendant's failure to object to misjoinder under Rule 8(a) is unwarranted and incorrect since defendant's moving papers did specifically cite Rule 8 and his attorney's supporting affidavit, while speaking in terms of prejudicial joinder, did address

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*Subsequent to the argument in the circuit court below, the Second Circuit ruled that joinder of the tax charges with substantive charges might be violative of Rule 8 as a matter of law. United States v. Halper, 590 F.2d 422 (2d Cir. 1978).

the lack of relatedness under Rule 8 as part of his reason for seeking severance.*

At least with respect to the three counts of the indictment charging false dependency exemptions (upon which defendant was sentenced to nine years imprisonment), the circuit court erred in attempting to distinguish between a Rule 8 misjoinder problem and a Rule 14 prejudicial joinder analysis. Both objections to joinder rest essentially upon the same evil of introducing "other crimes" evidence. Defendant should not have been subjected to a common trial for the extortion and obstruction of justice counts together with the false dependency counts since they bore absolutely no relationship to each other. His joint trial was inevitably different in character from a separate trial focusing only upon the false dependency claims. If the joinder was improper and the defendant noticed the trial court prior to

*The motion and supporting affidavit is item number 5 in the Record on Appeal filed below. The motion is appended to this petition as Appendix G.

trial of his objection to joinder, how he styled his motion should be immaterial since in actuality under the Rules of Criminal Procedure it is a Rule 12(b) motion and not a Rule 8 or Rule 14 motion. Were the law otherwise, the Government could join any number of disparate charges notwithstanding the clear mandate of Rule 8 and require a special showing of prejudice to obtain severance. In granting certiorari on this aspect of the case, the Court would have an opportunity to address the apparent confusion which now exists between Rule 8 and Rule 14 motions and clarify the procedural and substantive aspects of severance law.

Joinder of offenses is only permitted if they are "of the same or similar character, or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Fed. R. Crim. Pro. 8(a). These limitations prevent the free introduction of prejudicial other crimes evidence. Halper, 590 F.2d at 430.

Should joinder of offenses appear prejudicial to the defendant, the court may then order a separate trial of counts.* Fed. R. Crim. Pro. 14. Drew v. United States, 331 F.2d 85, 87 (D.C. Cir. 1964); United States v. Burkley, 591 F.2d 903, 919 (D.C. Cir. 1978); Halper, supra, 590 F.2d at 430 (2nd Cir. 1978); United States v. Weber, 437 F.2d 327, 332 (3d Cir. 1970); United States v. Foutz, 540 F.2d 733, 736 (4th Cir. 1976); United States v. Hatcher, 423 F.2d 1086, 1089 (5th Cir. 1970); United States v. Mullen, 550 F.2d 373, 375 (6th Cir. 1977) (J. Engel dissenting); Bayless v. United States, 381 F.2d 67, 72 (9th Cir. 1967).

Misjoinder occurred because the 1974 charges of extortion and tax evasion arose from loansharking and prostitution activities, while

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*In addition to the presence of other crimes evidence, two other grounds for severance are normally recognized. First, that the crimes are so similar that the jury will confuse the evidence of them. Second, that the defendant is embarrassed in his defense by having to present contradictory defenses or by desiring to testify on one charge but not on another. See Drew, supra, 331 F.2d at 88.

the 1971, 1972, and 1973 charges of false statements were based on construction work income. Hence, the charges were neither "same act or transaction" nor part of a "common scheme." While the false exemptions and tax evasion are both revenue violations, "similar acts" rationale fails since the only similarity is intent.* Since the charges were so distinct from one another, the other crimes prejudice inhered in

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*Evidence of the fact of the 1974 tax evasion if established properly might have been admissible to show a similar intent, Fed. R. Evi. 404(b). But, the prostitution and loansharking evidence, showing income for 1974, is so tenuously relevant and plainly inflammatory that it could not have been admitted at a separate trial for false exemptions. Fed. R. Evi. 403.

The case law supporting the contrary proposition, see Annot., "Joinder of Offenses Under Rule 8(a)," 39 A.L.R. Fed. 479, 504-05 (1978), is easily distinguished. For the most part, they concern either identical offenses occurring in the different years, different offenses occurring in the same year, or joinder in the indictment, not at trial. In Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968), the one case presenting facts similar to those at hand, the evidence on the various crimes was found to be mutually admissible. Cf. Drew, supra, 331 F.2d at 90.

their joinder, cf. Halper, supra, and severance should have been granted.

While the schema of joinder and severance appears simple to implement, the recent practice of treating the "other crimes" problem variously under the two labels of misjoinder and prejudicial joinder as exemplified by the circuit court's opinion has created procedural and substantive conflicts among the circuits. Procedurally, some circuits hold that all motions to sever are made pursuant to Rule 14, while others hold that separate objection to misjoinder as a challenge to the indictment is appropriate. See United States v. Lugo, 269 F. Supp. 757 (E.D. Wis. 1967).

Despite the uniform agreement on the problem of other crimes evidence, supra p. 5 , and on the proper remedy being severance, Finnegan v. United States, 204 F.2d 105 (8th Cir. 1953), cert. den., 346 U.S. 821; United States v. Harvick, 153 F. Supp. 696 (D.N.D. 1957); Lugo, supra; United States v. Pagan, 393 F. Supp. 1395 (D.P.R. 1975); 8 Moore's Federal Practice § 8.04[1]; §

14.02[1]; Wright, Federal Practice and Procedure, Criminal, § 145 n.6; § 221; the proper application for remedying the problem is unsettled. Some authorities indicate that the proper motion is made pursuant to Rule 14. United States v. Goodman, 285 F.2d 378, 379 (5th Cir. 1961); Note, "Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure," 74 Yale L. Rev. 553, 554 (1965). Others indicate that separate Rule 8(a) and Rule 14 motions are appropriately made pursuant to Rule 12(b)(2) and Rule 12(b)(5), respectively. Ochs, 595 F.2d at 1261, n.11; 8 Moore's Federal Practice § 8.04[1]; Decker, "Joinder and Severance in Federal Criminal Cases: An Examination of Judicial Interpretation of the Rules," 53 Notre Dame Lawyer 147, 163 n.97 (1977). Another authority indicates that the rules do not explicitly provide for an objection to misjoinder but that the court can remedy the problem upon motion. Wright, Federal Practice and Procedure, Criminal, § 145, pp. 335, 337.

In light of the uncertainty concerning the

proper motion to be made, permitting the defendant to be prejudiced merely because he moved under Rules 8 and 14 instead of Rule 12(b)(2) is a manifest injustice. The circuit court ruling is particularly harsh in that the defendant did, despite the circuit court's misimpression, object to the Rule 8 joinder in his motion. Furthermore, ample authority supports making the motion pursuant to Rule 14. See, e.g., Goodman, supra. So strictly construing the rules and taking the defendant to task for relying on one of several conflicting authorities will defeat the stated purpose of the Federal Rules of Criminal Procedure "to provide for a just determination of every criminal proceeding." Rule 2 (emphasis added). Finally, while the circuit court faulted the defendant for not objecting to the misjoinder, the prejudice of which the defendant complained was in fact the prejudice that the Rule 8 limitations on joinder were intended to prevent. The defendant's combined Rule 8 and Rule 14 motion should have been recognized as appropriate notice to the trial

court to justify severance. Cf. Wangrow v. United States, 399 F.2d 106, 110 n.1 (8th Cir. 1968) (single objection preserved both misjoinder and prejudicial joinder claims). The circuit court should not be allowed to sanction a prejudicial trial by strictly construing the rules in such an uncertain area of law.

The misjoinder/prejudicial joinder distinction has generated varying standards of review among the circuits as well as created unnecessary procedural pitfalls. Motions to sever are usually addressed to the trial court's discretion. In examining the exercise of discretion, the circuit courts have established two different standards for each of the two labels applied to the other crimes problem. Some courts hold that misjoinder is an error of law that must be corrected on appeal. See King v. United States, 355 F.2d 700 (1st Cir. 1966); Ingram v. United States, 272 F.2d 567 (4th Cir. 1959); Ochs, supra, 595 F.2d at 1260 n.11. Others have applied the harmless error standard under Rule 52(a). United States

v. Granello, 365 F.2d 990, 995 (2d Cir. 1966), cert. den., 386 U.S. 1019 (1967); United States v. Roselli, 432 F.2d 879, 901 (9th Cir. 1970), cert. den., 401 U.S. 924 (1971); United States v. Friedman, 445 F.2d 1076, 1083 (9th Cir.), cert. den., 404 U.S. 958 (1971). See generally Note, "Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion," 6 Hofstra L. Rev. 533 (1978); Decker, "Joinder and Severance in Federal Criminal Cases: An Examination of Judicial Interpretation of the Federal Rules," 53 Notre Dame Lawyer 147, 164-67 (1977). While Rule 14 provides for severance due to prejudice, see, e.g., United States v. Robinson, 503 F.2d 208, 215 (7th Cir. 1974), cert. den., 420 U.S.949 ; United States v. Lyon, 397 F.2d 505, 509 (7th Cir. 1968), cert. den., 393 U.S. 846; United States v. Figueroa-Paz, 468 F.2d 1055, 1057 (9th Cir. 1972), several courts have raised that standard to strong, clear, or substantial prejudice. Ochs, supra, 595 F.2d at 1260; United States v. Jamar, 561 F.2d 1103, 1106 (4th

Cir. 1977); United States v. Crouch, 528 F.2d 625, 631 (7th Cir. 1976), cert. den., 429 U.S. 900; United States v. Griffin, 464 F.2d 1352, 1358 (9th Cir. 1972); United States v. Hastings, 577 F.2d 38, 40 (8th Cir. 1978). With such a variety of standards to choose from, any given court could choose from among the following combinations in dealing with the single problem of other crimes evidence due to joint trial: legal error for misjoinder and prejudice for prejudicial joinder; harmless error for misjoinder and prejudice for prejudicial joinder; legal error for misjoinder and substantial prejudice for prejudicial joinder; harmless error for misjoinder and substantial prejudice for prejudicial joinder. Alternatively, Professor Wright's characterization of Rule 8(a) as permissive only (Wright, Federal Practice and Procedure, Criminal § 143) could be adopted, the concept of misjoinder as an error distinct from prejudicial joinder abandoned, and the prejudice inherent in the joining of unrelated crimes recognized under Rule 14. This approach would not only

have the advantage of simplicity, but would also most closely comport with the plain meaning of the rules.

Certiorari should be granted to resolve the confusion among the circuits over the procedural and substantive law of joinder and severance, to prevent an unduly strict reading of the rules resulting in an unjust determination of the defendant's case and the resulting conflict between circuits,and to grant the defendant relief from what has been recognized as a trial of charges under the prejudice of unnecessary other crimes evidence.

POINT IV

CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT CAN AUTHORITATIVELY DETERMINE WHETHER "CORRUPTLY" IS A MENS REA ELEMENT OF THE NOW FREQUENTLY CHARGED OFFENSE OF OBSTRUCTION OF JUSTICE UNDER 18 U.S.C. § 1503 AND APPLY ITS PRECEDENTS HOLDING THE OMISSION OF ESSENTIAL ELEMENTS FROM THE JURY CHARGE TO BE PLAIN ERROR.

In its charge to the jury on the offense of obstruction of justice, the trial court materially misstated the law by excluding the word "corruptly" as an element of the crime. Such misstatement resulted in a failure to instruct on all essential elements of the crime charged and constituted "plain error" in the jury charge. Fed. R. Crim. P. 30, 52(b).

The Government attempted to prove its case on the obstruction of justice count by evidence to the effect that the defendant approached his friends who were subpoenaed by the grand jury investigating his activities, informed them of their privilege against self-incrimination and requested them to avoid, if possible, discussing interest payments made to him. In its charge to

the jury on the obstruction count, the trial court instructed that

> [t]he indictment specifically charges the defendant with "corruptly" endeavoring to influence the designated witness or witnesses. The word 'corruptly' does not add an additional element to the crime. I charge you as a matter of law that any unauthorized endeavor to influence a witness in the performance of his duty to testify violates the law. It is the endeavor, not the corruption, which is the gist of the crimes (emphasis added).

Since the trial court nowhere else in its charge listed the essential elements of the crime of obstruction, the plain meaning of its charge is that criminal liability attaches to any interaction with a grand jury witness regardless of its motivation. Such an interpretation of the statute in deleting the mens rea element of corruptly was clearly overbroad. It permitted the jury to find guilt even if it disbelieved the Government's evidence that the defendant asked the witnesses to avoid testifying about certain matters and only believed that the defendant did advise the witnesses concerning constitutional

limits on their duty to testify.*

In response to the defendant's claim of plain error for this mis-instruction and consequent failure to charge an essential element of the crime, the circuit court conceded "we do not understand why the judge said what he did" but in light of other portions of the charge plain error was not committed. 595 F.2d at 1261. These saving portions were:

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*While a grand jury witness is not entitled to Miranda warnings to protect his Fifth Amendment rights,

> [t]he grand jury's authority to compel testimony is not without limits. The same Amendment that establishes the grand jury also guarantees that "no person . . . shall be compelled in any criminal case to be a witness against himself. . . ." The duty to give evidence is therefore conditional; every person owes society his testimony, unless some recognized privilege is asserted. United States v. Mandujano, 425 U.S. 564, 572 (1976) (plurality opinion) (emphasis added).

Since the duty is constitutionally conditioned, advice as to the scope of the duty should not be necessarily construed as interference with the duty.

> The defendant must corruptly endeavor, that is deliberately and by his action, to influence the witness to testify falsely, evasively, or to corruptly have the witness assert their [sic] Fifth Amendment privilege when otherwise they would testify.
>
> [and]
>
> [a]ny . . . endeavor, whether successful or not, which is made for the purpose of corruptly influencing a witness is condemned.

If the jury followed the trial court's instruction construing "corruptly" as not adding an element to the crime, the additional instructions did nothing to rectify the deletion of the mens rea element. The effect of the "corruptly" instruction can be readily seen by removing that word from the other portions of the charge. The language still remaining would have permitted a finding of guilt for "hav[ing] a witness assert his Fifth Amendment privilege" or for "any endeavor" to influence a witness. Such a deletion of any essential element has often been held to be plain error. Screws v. United States, 325 U.S. 91, 107 (1945); United States v. De Marco, 488

F.2d 828, 832 (2d Cir. 1973); United States v. Small, 472 F.2d 818, 819 (3d Cir. 1972); United States v. O'Dell, 462 F.2d 224, 233 (6th Cir. 1972); United States v. Thomas, 459 F.2d 1172, 1176 (D.C. Cir. 1972); United States v. Gaither, 440 F.2d 262, 264 (D.C. Cir. 1971).

Alternatively, the instruction on "corruptly" and the other language using "corruptly" to describe the proscribed activities can be viewed as contradictory. The jury, so charged, could only have been confused by such ambiguous language. Indeed, even the circuit court was puzzled by the complained of deletion of "corruptly." 595 F.2d at 1261. Jury instructions admitting no meaning or only ambiguous meaning have been held by this Court to constitute plain error. Bollenbach v. United States, 326 U.S. 607, 613-15 (1946). Cf. De Marco, supra, 488 F.2d at 832. As that Court said, "A conviction ought not rest on an equivocal direction to the jury on a basic issue." 326 U.S. at 613.

Assuming, arguendo, that the circuit court

properly applied the plain error doctrine, the logical implication of its holding is that "corruptly" does not constitute an element of the crime. Contrary to any such implication, "corruptly" has been held to be an essential element of obstruction. United States v. Roe, 529 F.2d 629, 633 (4th Cir. 1975); "Fifth Circuit Pattern Instruction," cited at Devitt and Blackman, Federal Jury Practice and Instructions § 32.03 (West Supp. 1979). This essential element, however, has been variously defined. The majority of circuits views "corruptly" as indicating an improper motive and thus focusing on the mens rea of the offense. Martin v. United States, 166 F.2d 76, 79 (4th Cir. 1948); United States v. Ryan, 455 F.2d 728, 734 (9th Cir. 1971); United States v. Partin, 552 F.2d 621 (5th Cir. 1977); United States v. Zolli, 51 F.R.D. 522, 526 (E.D.N.Y. 1970). Others hold that corruptly encompasses any attempt or endeavor to influence a witness. Broadbent v. United States, 149 F.2d 580, 581 (10th Cir. 1945); Bosselman v. United States, 239 F. 82,

86 (2d Cir. 1917); United States v. Cohen, 202 F. Supp. 587, 588 (D. Conn. 1962).

Delineating the mens rea element of obstruction is particularly important in light of the broad nature of the crime. See "Annotation Construction and Application of 18 U.S.C. § 1503," 20 A.L.R. Fed. 731, 739-40 (1974). For an example of the statute's far reaching scope, see United States v. Fasolino, 449 F. Supp. 586 (W.D.N.Y. 1978), aff'd, 586 F.2d 939, denying a motion to dismiss an indictment for obstruction alleging that the defendant had asked an attorney to use his friendship with a sentencing judge as a basis for a leniency request. See also Cohen, supra, 202 F. Supp. at 588-89.

In the area of advising persons of constitutional rights, instructing an intent is crucial, since evil motive has been held to be the difference between innocence and guilt. Cole v. United States, 329 F.2d 437, 439-41 (9th Cir. 1964), cert. den., 377 U.S. 954; contra United States v. Grunewald, 233 F.2d 556, 571 (2d Cir.), rev'd on

other grounds, 353 U.S. 391 (1957).

Certiorari should be granted to resolve the conflict among the circuits concerning the requisite mens rea for the commission of the broadly defined crime of obstruction of justice and to apply this Court's precedents concerning plain error in the charge to the jury in the instant case.

POINT V

CERTIORARI SHOULD BE GRANTED SO THAT A SENTENCE WHICH ON ITS FACE IS IRRATIONAL AND IMPROPERLY MOTIVATED CAN BE VACATED IN THE INTEREST OF MAINTAINING AND FOSTERING THE INTEGRITY OF THE FEDERAL JUDICIARY.

On its face the trial court's sentence in this case is peculiar in its structure. The aggregate prison term of twenty-three (23) years is composed of sever (7) [of maximum of 20] for extortion; five (5) [the maximum] for obstruction of justice; nine (9) [the maximum] for three counts of claiming false dependency exemptions on income tax returns; and two (2) [of maximum of 5] for income tax evasion. The most substantial component of defendant's sentence was the nine years for the false dependency exemptions. That is an offense which Congress has provided the least maximum penalty for of the various offenses he was convicted upon. Moreover, he received for each count of false statement a greater sentence than he received for the evasion itself. The circuit court was itself troubled by the structure but concluded that a greater aggregate sentence

could have been justified. 595 F.2d at 1262. Although trial courts enjoy a very wide latitude in the imposition of discretionary sentences within the statutory ranges, no trial court conduct should be immune from appellate review simply because it involves the sentencing process if it is indeed irrational. The "logic" of this particular defendant's sentence would appear to have been motivated by a desire of the trial court to insulate as much of defendant's sentence as possible from the impact of an appellate reversal of counts intimately tied to the much contested search and seizure issue. The circuit court recognized as much but observed, "[p]articularly in light of our disposition of the suppression claim, we are not concerned with how the sentence was structured." 595 F.2d at 1262. Assuming that the trial court's sentence was indeed structured to insulate it from the effect of a possible reversal on the suppression issue, the actual disposition of that appellate claim should not neutralize the impropriety of the trial court's

sentence. An irrational sentence does not cease to be so because it could have been imposed in a rational manner; a vindictive sentence does not become proper because it could have been structured in a lawful fashion. Accordingly, the writ of certiorari should issue on this aspect of the case to examine the implications of sentences of this kind for the integrity of the federal judiciary.

It is not possible in the instant case to rationalize defendant's sentence in any way other than as a blatant effort by the trial court to secure as much of its sentence as possible from the possible reversal of the search issue. In establishing a maximum range of twenty (20) years for extortion, Congress indicated its regard for the seriousness of that offense as compared to the three (3) year maximum for each false statement offense. Yet for extortion defendant received a sentence of seven (7) years and for repeatedly claiming a wife and children he allegedly did not have he was sanctioned by

the district court to an aggregate sentence of nine (9) years. The false dependency counts were not proved with the records taken from the defendant's briefcase. Those records were vital in the prosecution of the extortion count.

Comparing the tax sentences themselves produces no valid explanation for the nine year sentence for the false dependency exemptions. The Federal Courts have recognized false exemptions as a lesser wrong than tax evasion by holding false exemptions to be a lesser included offense of tax evasion. United States v. Lodwich, 410 F.2d 1202 (8th Cir. 1969); Gaunt v. United States, 184 F.2d 284, 288 (1st Cir. 1950). Finally, the false exemptions denied the Government about $2,500.00 in taxable income per count; the evasion denied the Government tax upon taxable income of $25,000.00. 595 F.2d at 1251. Yet for the evasion defendant received only two years. This offense was also proved with the tainted records.

While there is widespread disagreement and disparity in the imposition of particular sentences

for tax cases, where custodial terms are imposed they rarely exceed three years. See J. Craig, "Sentencing in Tax Fraud Cases," 24 Tax Lawyer 49 (1970). Where more substantial custodial terms are imposed in tax cases, the usual motivation is to punish other offenses as in a pattern of organized criminal activity. See id. at 55, 60. It is obvious in the instant case that the severe custodial sentence meted out on the false statement counts cannot be explained in that way since the court had available to it a twenty (20) year range for another substantive offense--the alleged extortion--if it felt that defendant was a danger to the community or had led a life of crime free from sanction. There was absolutely no need to resort to the tax violations to reach a properly punitive sentence.

In light of the additional charges upon which the defendant could be sentenced, the only possible reason for the unusual structure was to punish the defendant most harshly on those counts least vulnerable to appellate reversal. As demonstrated

above in Point III, the false exemption counts were unrelated to the other charges. They occurred in different years and were proved by different evidence. Hence, they were least threatened by the illegality inherent in the search of the defendant's briefcase which led to the defendant's indictment and trial.

Such an exercise of discretion is wrongfully motivated for two reasons. First, it punishes the defendant for exercising his right of appeal by prospectively enhancing his incarceration in anticipation of a successful appeal. While the trial court could not increase the defendant's sentence without additional objective facts arising after his first conviction, North Carolina v. Pearce, 395 U.S. 711, 726 (1969), and indeed might not have the opportunity to resentence on certain of the counts involved herein due to the suppression of illegally seized evidence, it has nonetheless meted out substantial and unusual punishment for the specific crime. Indeed, the sentence structure not only punishes the defendant's assertion of rights, but also renders

his appeal partially futile, since the bulk of the punishment, nine years, is arguably beyond the reach of the Fourth Amendment argument. The arbitrary sentence structuring employed here has the same, if not greater, potential for vindictive sentencing as the enhancement of sentencing on retrial following a successful appeal. This potential should also be limited by the adoption of a prophylactic rule, either mandating an explanation for such an unusual structure or prohibiting such irrationality. Cf. Blackledge v. Perry, 417 U.S. 21, 27 (1974).

Secondly, the isolation of the largest component of the sentence undermines the deterrence effect upon which this Court has based the Fourth Amendment exclusionary rule. See Michigan v. De Fillippo, 47 U.S.L.W. 4805, 4807 n.3 (June 25, 1979). The exclusionary rule deters unlawful police action by prohibiting the use of illegally seized evidence at trial and thereby preventing the punishment of crime via unconstitutional enforcement proceedings. The prevention of punish-

ment removes the motive for pursuing criminal activity in an unconstitutional fashion. The trial court, by imposing enhanced punishment on the counts isolated from the search and seizure claim, circumvented the prohibition against punishment based on illegally seized evidence. Compare Verdugo v. United States, 402 F.2d 599, 611 (9th Cir. 1968), cert. den., 397 U.S. 925 (defendant could not be sentenced on the basis of illegally seized evidence specifically directed at his sentence).

While this Court has previously held the sentence within the limits set by law are generally not reviewable, United States v. Tucker, 404 U.S. 443, 447 (1972); Dorszynski v. United States, 418 U.S. 424, 440 (1974), this Court has also vacated sentences imposed in contravention of constitutional rights. Pearce, supra; Tucker, supra. As in Pearce, the sentence herein should be vacated and the defendant should be resentenced in a manner preventing the arbitrary and wrongful imposition of sentence to make an appeal less

effective. As in Tucker, the sentence herein should be vacated so that constitutional standards this Court has adopted to effectuate the prohibition of unreasonable searches and seizures will not be circumvented.

Furthermore, this Court should exercise its supervisory powers over the Federal Courts to correct the trial court's gross abuse of power in imposing an irrational and wrongfully motivated sentence. While this Court has noted that the sentencing court traditionally enjoys wide discretion in imposing punishment within the law, Dorszynski, 418 U.S. at 440, that discretion is not unlimited. Not only has this court subjected the discretion to constitutional limits, but the circuit courts have uniformly and traditionally held the sentencing court's decision subject to review for gross abuse of discretion. Crespo v. United States, 151 F.2d 44, 46-47 (1st Cir. 1945), cert. dism., 327 U.S. 758; United States v. Holder, 412 F.2d 212, 214-15 (2d Cir. 1969); United States v. Frank, 245 F.2d 284, 288 (3d Cir. 1957), cert.

den., 355 U.S. 819; Tincher v. United States, 11 F.2d 18, 21 (4th Cir. 1926), cert. den., 271 U.S. 664; United States v. Weiner, 418 F.2d 849, 851 (5th Cir. 1969); Livers v. United States, 185 F.2d 807, 809 (6th Cir. 1950); United States v. Cosentino, 191 F.2d 574, 575 (7th Cir. 1951); Woosley v. United States, 478 F.2d 139 (8th Cir. 1973); Verdugo v. United States, 402 F.2d 599, 611-13 (9th Cir. 1968), cert. den., 397 U.S. 925; United States v. Donohoe, 458 F.2d 237, 239 (10th Cir. 1972), cert. den., 409 U.S. 865.

The abuse of discretion in the instant sentence is manifest. To uphold an irrational exercise of sentencing power not only offends fundamental fairness, cf. Pearce, supra, but also threatens the integrity of the Federal judiciary. Certiorari should be granted to that the defendant can be sentenced in accordance with the principles of fundamental fairness announced by this Court, so that this Court's Fourth Amendment policies can be fully effectuated, and so that a gross abuse of discretion by the imposition of an irrationally structured sentence can be corrected.

CONCLUSION

For all of the foregoing reasons, the writ of certiorari should be granted to review the final judgment of the United States Court of Appeals for the Second Circuit. That judgment should be vacated and the matter remanded to the Circuit Court for reconsideration in light of the principles of law enunciated by this Court in Arkansas v. Sanders, ____ U.S. ____ (June 20, 1979). Alternatively, the writ should issue to review each of the important questions of law raised in this petition.

Respectfully submitted,

STEVEN H. GIFIS
Attorney for Petitioner

Dated: July 24, 1979

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, UNITED STATES V. OCHS, 595 F.2d 1247

OPINION MARCH 13, 1979

REHEARING DENIED MAY 25, 1979

Before FRIENDLY, MANSFIELD and MESKILL, Circuit Judges.

FRIENDLY, Circuit Judge:

George Ochs was the subject of a seven count indictment filed in October, 1977 in the District Court for the Southern District of New York. Count One charged him with the use of extortionate means to collect a loan he had made to Debbie McElroy, in violation of 18 U.S.C. § 894. Count Two charged that he had obstructed justice by endeavoring to influence witnesses subpoenaed to testify before a grand jury, in violation of 18 U.S.C. § 1503. Counts Three through Five charged that he had falsely subscribed income tax returns for 1971, 1972 and 1973, in violation of 26 U.S.C. § 7206(1) by claiming personal exemptions to which he knew he was not entitled. Count Six charged him with failure to file his 1974 income tax return, in violation of 26 U.S.C. § 7203, and Count Seven charged him with evading his 1974 federal income taxes, in violation of 26 U.S.C. § 7201.

The Government's proof at a trial before Judge Cooper and a jury sufficiently demonstrated that during the years 1974 through 1976 Ochs owned and operated a New York City massage parlor and conducted a loansharking business and that in the course

of his loansharking activities Ochs threatened to murder Debbie Frank McElroy, a prostitute whom he employed at his Studio One massage parlor, for failure to make interest payments on an usurious loan. The evidence further revealed several violations of the federal income tax laws. On his 1971, 1972, and 1973 tax returns Ochs claimed false exemptions for a non-existent wife and several children, and in 1974 Ochs received $25,000 in income from his prostitution and loansharking businesses which he did not report; indeed Ochs filed no tax return for 1974. Finally, while Ochs was being investigated by a federal grand jury sitting in the Southern District of New York, he approached witnesses who were subpoenaed to appear before the grand jury and instructed them to lie when questioned about payments of interest made on loans. Ochs instructed the witnesses in the alternative to refuse to testify before the grand jury by asserting their Fifth Amendment privilege.

The jury found Ochs guilty on all counts. Judge Cooper sentenced him to consecutive terms of imprisonment of seven years on Count One, five years on Count Two, three years on each of counts Three, Four and Five, and two years on Count Seven, for a total of twenty-three years.[1]

I. Search and Seizure

The point for reversal most strongly pressed by Ochs is that he was the subject of an illegal search.

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1. The judge suspended the imposition of sentence on Count Six which he regarded as a lesser included offense encompassed by Count Seven.

After a two day hearing, the district court rendered an opinion denying suppression. 461 F.Supp. 1 (1978). The circumstances were as follows:

> While cruising in a patrol car in the afternoon of September 5, 1975, in the vicinity of the B. Altman department store at Fifth Avenue and 35th Street in New York City, Police Officers O'Malley and Kelly were signalled by Theodore Bielefeld, the store's assistant director of security. He informed the officers that a "ring" of men, he believed three, were engaged in cashing stolen American Express travelers' checks and had just passed such checks in the store; that two of them were then seated in a blue Cadillac automobile parked on East 35th Street between Fifth and Madison Avenues and a third, known to Bielefeld as Julian Mitchell was no longer in sight; and that Ochs, whom Bielefeld described, had just brought to the store for refund goods procured by Mitchell with stolen American Express checks on the previous day but "for an unknown reason" had not obtained a refund and had left the refund counter. Bielefeld had observed Ochs enter the Cadillac. He showed the officers photostatic copies of stolen American Express checks in the name of O. Grable that had been cashed in the store the previous day and a picture of Mitchell. After Bielefeld had confirmed that the two men were still in the Cadillac, the officers approached it, O'Malley on the driver's side where Ochs was sitting, Kelly on the passenger side where one Liveo was seated. O'Malley perceived that Ochs fitted the description given by Bielefeld and observed that an open knife on the front seat between Ochs and Liveo. One of the officers opened the car and seized the knife, which they identified as a gravity knife, as defined in New York Penal Law § 265.00(5), possession of which is a misdemeanor, and if the possession is by any

person previously convicted of crime,[2] a felony, id.. § 265.02(1).

The officers then ordered Ochs and Liveo out of the car and frisked them without result. However, as O'Malley was frisking Liveo, he noticed a black object on the left front wheel well floor. Thinking this might be a weapon, he reached in and took possession of the object, which turned out to be a book of American Express checks in the name of O. Grable, identical with those used by Mitchell at Altman's.

After administering the Miranda warnings, the officers questioned Ochs about the ownership of the automobile. Ochs said it belonged to a friend but could not say where the friend was at the time. He produced a New York State driver's license and a registration certificate for the vehicle in the name of Otto Narday. O'Malley claimed that the upper portion of the registration certificate had been tampered with, a "7" having been changed to an "f".[3]

O'Malley tried to verify the car's legal status through the National Crime Information Computer but static interfered. Obtaining aid from another police car, O'Malley arrested and handcuffed Ochs and Liveo for possession of the gravity knife and removed them to the Midtown South station house. He also arranged

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2. Ochs had five prior convictions.

3. Narday testified that in fact the car belonged to him, but that Ochs, to whom he was heavily indebted, could use it whenever he desired and in fact had it 90% of the time.

to have one of the policemen drive the Cadillac to the same precinct, where it was "vouchered."

After having placed Ochs and Liveo in a detention cell, O'Malley and Kelly searched the Cadillac and made an inventory of its contents. The search yielded a .32 caliber starter's pistol, a simulated revolver, a scanning receiver (a device used to listen to police radio transmissions), a B. Altman sweater, a second book of stolen travelers' checks, and, in the footwells of the back seat, two unlocked briefcases which were taken into the police station. These were examined, without protest, in the presence of Ochs who was nearby in the detention cell.

One of the briefcases contained 8"x14" ledger sheets, loose "index cards" bearing names and showing what appeared to be loans and payments, four bankbooks, two small notebooks containing loan records, and a calculator. The search of these papers appears to have been in two phases. The police first leafed through the papers to ascertain whether any contraband, money, valuables, etc. were mixed in among them. Then the police read some of the papers, starting with the ledger sheets (the order after that is not clear). The loose ledger sheets were marked "Studio 1". Because he had been to a "Studio 1" before on police calls, Officer O'Malley was aware that there existed in the city a "Studio 1" which was a house of prostitution. However, no expertise was needed to detect that these sheets, containing the first names of women (styled "models"), times in and out, customer and "model" fees, were the records of such an establishment. In going through the bankbooks the officers observed that three of the books were in the names of persons other than Ochs or Narday. The police testified that upon noticing this discrepancy they came to believe that the bankbooks were stolen. The officers also examined the loose index cards, and went

through the notebooks, which turned out to contain records of loansharking activities. Officer O'Malley testified that he had come upon a mention of "vig.", a standard term in loansharking for the penalty on a late payment, but, on being confronted with the books, was unable to locate anything more than a "v" before a date and a sum of money in the middle of one of them. All these items were seized. Ochs claims that the reading and seizure of the contents of the briefcase violated his rights under the Fourth Amendment.

The Government's first riposte is a challenge to Ochs' standing. As the briefs were filed and argument was had before the Supreme Court's decision in Rakas v. Illinois, ___ U.S. ___, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), the debate was couched in terms of Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) and Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973), with Ochs relying on the fact that he was "legitimately on premises where a search occurr[ed]", 362 U.S. at 267, 80 S.Ct. at 734, this apparently being, in his view, when the automobile was seized. Under Rakas that alone is not sufficient, ___ U.S. at ___, 99 S.Ct. 421. Now Ochs is obliged to show that he had a legitimate expectation of privacy with respect to the contents of the briefcases, and we must apply the teachings of Rakas in determining what constitutes such an expectation on the part of the users of an automobile.

[1] The Court found that Rakas and King, his companion, who were merely passengers in a car driven by its owner, had no such legitimate expectation with respect to the objects seized in that car since "[t]hey asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized." ___U.S. at ___, 99 S.Ct. at 433. Ochs also asserted

no interest in the property seized. Indeed, he declined the Government's invitation to submit a "possessory affidavit" at the suppression hearing.[4] He likewise asserted no proprietary interest in the automobile, although the Government claimed at trial that he was the de facto owner. However, the record shows that he had a possessory interest in the car. As indicated above, see note 3 supra, the record owner allowed him to use it whenever he wished and Ochs freely availed himself of the privilege. The very grounds on which the Rakas Court distinguished Jones v. United States, supra, work in Ochs' favor. Just as was the case with Jones and his friend's apartment, Ochs "not only had permission to use" the car but "had a key" to it. Except with respect to the owner, Ochs "had complete dominion and control" over the car "and could exclude others from it." We therefore reach his claim on its merits.

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4. Despite the Court's refusal in Rakas, ___ U.S. at ___ n.1, 99 S.Ct. 421, to remand in order to afford petitioners another opportunity to claim a proprietary or possessory interest, we would be concerned about dismissing Ochs' Fourth Amendment claim on the basis of his failure to assert such an interest. At the time of the suppression hearing Ochs had reason to rely on the "legitimate presence" theory, and there was no occasion for him to assert that the briefcase and its contents were his when this seemed unnecessary to his suppression claim. Moreover, the Government asserted at trial that Ochs was the owner of the briefcase and its contents, as it had previously conceded that it would. It is not clear whether Rakas eliminates "automatic standing" in cases of prosecutorial self-contradiction, see ___ U.S. at ___ n.4, 99 S.Ct. 421, at ___ n.6, 99 S.Ct. 421 (dissenting

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[2] Ochs does not seriously dispute that the police had probable cause to arrest him both for trafficking in stolen travelers' checks and for being in possession of a gravity knife. Since we are here dealing with an automobile which, in sharp contrast to the car in Coolidge v. New Hampshire, 403 U.S. 443, 460, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), was being used for an illegal purpose and was parked not in the driveway of the owner's house but on a public street, the police were entitled to search it on the spot for additional stolen checks and for weapons, even in areas that were not within "grabbing distance" under Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). See id. at 764 n.9, 89 S.Ct. 2034; Chambers v. Maroney, 399 U.S. 42, 50-52, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). Moreover, the police were not required to make the search at that time and place. The car was illegally parked on a busy New York City street

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opinion). There was no such necessary self-contradiction in Rakas since the state could have contended that even if the defendants had neither a property interest nor possession, their knowledge or prior use of the rifle and shells had probative value. Justice White, in dissent, took the view that self-contradiction, ___ U.S. at ___ n.6, 99 S.Ct. 421, and the decision below, People V. Rakas, 46 Ill.App.3d 569, 4 Ill.Dec. 877, 360 N.E.2d 1252 (1977), indicates this. See 4 Ill.Dec. at 879, 360 N.E.2d at 1254. In light of our conclusion that Ochs had standing because of his possessory interest in the automobile, we find it unnecessary to resolve this issue.

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during the afternoon rush hour, and the police were entitled to take it and its occupants to the precinct, where a search could safely be made. Chambers v. Maroney, supra, 399 U.S. at 52 n.10, 90 S.Ct. 1975.

[3,4] Once, the car was there, the police had the same right to make a prompt search of it as they had before, since, given the probable cause to search that existed, "there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." Chambers v. Maroney, supra, 399 U.S. at 52, 90 S.Ct., at 1981. As said in the plurality opinion in Coolidge, supra, 403 U.S. at 463, 91 S.Ct., at 2036, "where the police may stop and search an automobile under Carroll, [Carroll v. United States, 267 U.S. 132, [45 S.Ct. 280, 69 L.Ed. 543] (1925)] they may also seize it and search it later at the police station." Chambers also teaches that "the mobility of the car [still obtains at the station house] unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured." 399 U.S. at 52, 90 S.Ct., at 1981. In the present case, this "mobility" of the car, and the resultant exigency of the search, were particularly pressing, since Ochs was not the owner of the car, and his friend, Narday, whom Mitchell, the third member of the thieving party, might have alerted, could have claimed it and its contents at any time. See United States v. Frick, 490 F.2d 666, 669-70 (5 Cir. 1973), cert. denied, 419 U.S. 831, 95 S.Ct. 55, 42 L.Ed.2d 57 (1974); United States v. Evans, 481 F.2d 990, 994 (9 Cir. 1973). Such a search may include containers which police have probable cause to believe may contain evidence of the crime which justifies the search. See, e.g., United States v. Tramunti, 513 F.2d 1087, 1104 (2 Cir. 1975), cert. denied, 423 U.S. 832, 96 S.Ct. 54, 46

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L.Ed.2d 50 (1975); United States v. Canada, 527 F.2d 1374, 1379-80 (9 Cir. 1975), cert. denied, 429 U.S. 867, 97 S.Ct. 177, 50 L.Ed.2d 147 (1976); United States v. Davis, 496 F.2d 1026, 1031-32 (5 Cir. 1974); United States v. Frick, 490 F.2d at 669-70 (5 Cir. 1974), cert. denied, 419 U. S. 831, 95 S.Ct. 55, 42 L.Ed.2d 57 (1974).

[5] We see no indication that the authority of Chambers has been impaired. The plurality opinion in Coolidge v. New Hampshire, supra, 403 U.S. at 459-60, 91 S.Ct. 2022, was at pains to distinguish Chambers as being inapplicable to a car not claimed to have been then engaged in any illegal activity and parked at Coolidge's home, which was seized several weeks after an investigation had commenced, see 403 U.S. at 463-64 & n.20, and 523, 91 S.Ct. 2022 (opinion of Mr. Justice White). In Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974), four Justices thought Chambers to be applicable, four thought it not to be, and the casting vote went on a ground that avoided decision of the merits. In any event the case differed from Chambers and from ours in that the arrest of the defendant and the seizure of the car were not made under exigent circumstances; there had been ample time to procure a warrant before the car was seized. Finally, although the question may be closer, United States v. Chadwick, supra, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), did not affect the viability of Chambers on facts such as these.[5] The Chief

5. Some courts have thought the contrary, see United States v. Stevie, 582 F.2d 1175, 1179 (8 Cir. 1978) (en banc) petition for cert. filed, 47 L.W. 3437 (U.S. Dec. 15, 1978) (No. 78-971) (luggage seized in car stopped on the highway can only be searched pursuant to warrant); United States v. Vallieres, 443 F.Supp. 186, 191 (D.Conn.1977); see also Sanders v. State, 262 Ark. 595, 559 S.W.2d 704 (1977), cert. granted, ___ U.S. ___, 99 S.Ct. 247, 58 L.Ed.2d 236 (1978)(No.77-1497). The Ninth Circuit, however, has concluded that

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Justice there stressed that the Government did "not contend that the footlocker's brief contact with Chadwick's car makes this an automobile search", 433 U.S. at 11, 97 S.Ct., at 2483-2484, and noted that the Court had sustained "'warrantless searches of vehicles ...in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not non-existent,'" id. at 12, 97 S.Ct., at 2484, quoting Cady v. Dombrowski, 413 U.S. 433, 441-42, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), and citing Chambers v. Maroney. The reason for the Government's failure to contend that the Chadwick case was governed by Chambers was doubtless that the footlocker had never been in the automobile

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luggage searches pursuant to Chambers remain untouched by Chadwick, see United States v. Finnegan, 568 F.2d 637, 641 (9 Cir. 1977). See also United States v. Gaultney, 581 F.2d 1137, 1144 (5 Cir. 1978). And even the Eighth Circuit has shown some reluctance to extend Chadwick beyond luggage , see United States v. Neumann, 585 F.2d 355, 360-61 (8 Cir. 1978) (closed box can be searched). See also United States v. Stevie, supra, 582 F.2d at 1180 (Gibson, J., dissenting); United States v. Currington, 451 F.Supp. 39, 43-44 & n.6 (S.D.N.Y. 1978); United States v. McGrath, 448 F.Supp. 1338, 1341-42 (S.D.N.Y.1978). Our statement in United States v. Marchand, 564 F.2d 983, 991-92 (2 Cir. 1977), cert. denied, 434 U.S. 1015, 98 S.Ct. 732, 54 L.Ed.2d 760 (1978), which Chief Judge Gibson criticized in his dissent in Stevie, has no bearing on the problem of automobile searches.

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in any meaningful sense; it had been placed in the trunk, which was still open, and the engine had not been started. 433 U.S. at 4, 97 S.Ct. 2476. The Court did not pass on the legality of a warrantless search of suitcases within the car, since the Government had not drawn into question the adverse ruling of the Court of Appeals on this point, 433 U.S. at 5 n.1, 97 S.Ct. 2476, and none of the majority save Mr. Justice Brennan questioned the assertion of Mr. Justice Blackmun (joined by Mr. Justice Rehnquist) in dissent, that "if the agents had postponed the arrest just a few minutes longer until the respondents started to drive away, then the car could have been seized, taken to the agents' office, and all its contents -including the footlocker-searched without a warrant." Id. at 22-23 & n.4, 97 S.Ct., at 2489. Two additional circumstances further distinguish this case from Chadwick. The first, of lesser consequence, is that the briefcases, unlike the Chadwick footlocker, were not locked. The second is the exigent circumstance arising from the likelihood of Narday's appearing at the station and demanding the car and its contents. This implicates directly the statement already quoted from Chambers that when probable cause exists, the police must be allowed to make a thorough investigative search of a car and its contents "unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured", 399 U.S. at 52, 90 S.Ct., at 1981, see Chadwick, supra, 433 U.S. at 13-14 n.8, 97 S.Ct. 2476.

[6] Since in our view Chadwick does not make the search of the contents of the briefcase a per se violation of the Fourth Amendment, we prefer to rest our decision on the ground that Chadwick did not impair Chambers rather than on our decision in United States v. Reda, 563 F.2d 510 (2 Cir. 1977)

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cert. denied, 435 U.S. 973, 98 S.Ct. 1617, 56 L.Ed.2d 65 (1978), holding Chadwick inapplicable to pre-Chadwick searches-in that case also not an automobile search. Appellant claims that Reda gave inadequate weight to the remand of Schleis v. United States, 433 U.S. 905, 97 S.Ct. 2968, 53 L.Ed.2d 1089 (1977), for further consideration in light of Chadwick, see opinion on remand, 582 F.2d 1166, 1173-74 & n.6 (8 Cir. 1978). Chadwick was decided after an affirmance of Reda's conviction by oral order from the bench and the effect of Chadwick was raised on a pro se petition for rehearing. Neither the petition nor the Government's response called the panel's attention to the remand of Schleis.[6] While Reda remains the law of this circuit, we need not rely on it when what we consider a more satisfactory basis for decision is available.

[7,8] While substitution of Chambers for South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), the authority relied on by the district court as the basis for what it held to be a valid inventory search, see 461 F.Supp. at 9, does not end the case, it affords the proper framework for analysis. There is no reason why the conduct of the police in this case should be tested under the more limited principles of Opperman, appropriate to the taking of an inventory when there was no reason to believe that the car might contain the fruits or means of a criminal enterprise. There Mr. Justice Powell, whose vote was needed to make up a majority, pointedly observed, 428 U.S. at 380 n.7, 96 S.Ct., at 3102:

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6. The bearing of the Supreme Court's remand of Schleis was likewise not discussed in United States v. Montgomery, 558 F.2d 311 (5 Cir. 1977), on which the Reda panel relied.

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As part of their inventory search the police may discover materials such as letters or checkbooks that "touch upon intimate areas of an individual's personal affairs," and "reveal much about a person's activities, associations, and beliefs." California Bankers Assn. v. Shultz, 416 U.S. 21, 78-79, [94 S.Ct. 1494, 1525, 39 L.Ed.2d 812] (1974) (Powell, J., concurring). See also Fisher v. United States, 425 U.S.391, 401 n.7, [96 S.Ct. 1569, 1576, 48 L.Ed.2d 39] (1976). In this case the police found, inter alia, "miscellaneous papers," a checkbook, an installment loan book, and a social security status card.

...There is, however, no evidence in the record that in carrying out their established inventory duties the Vermillion police do other than search for and remove for storage such property without examining its contents.

Mr. Justice Marshall, speaking for four Justices, 428 U.S. at 388 n.6, 96 S.Ct., at 3107, agreed with this and went on to ".....note that the Court's opinion does not authorize the inspection of suitcases, boxes, or other containers which might themselves be sealed, removed, and secured without further intrusion." To be sure, it is also true that neither the plurality opinion nor Mr. Justice Powell's concurrence says that inspection of containers is not authorized in an inventory search, and arguably such containers, at least if unlocked, should be as inspectable as the unlocked glove compartment in Opperman, which could also have been sealed. Be all this as it may, the question whether Opperman permits inspection of sealable containers as an incident to an inventory is an open and serious one, see, e.g., United States v. Hill, 458 F.Supp. 31 (D.D.C.1978), and there is no reason why the Government should have to assume the burden of showing that the search of Ochs' briefcases was permissible as an incident to an inventory search

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when Chambers allowed an investigative search. It is of no importance that the police may have thought their only power was to make an inventory; the test is what could lawfully be done, not what the policemen thought the source of their power to be.

The serious question is whether, granted all this, the search, particularly the reading and seizure of records found in the briefcase, did not exceed reasonable bounds. It could be argued that since Chimel v. California, supra, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 did not overrule Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947), and United States v. Rabinovitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950), as applied to automobile searches, 395 U.S. at 764 n.9, 89 S.Ct. 2034, the question is readily answered in favor of the Government. However, we are not obliged to go so far.

[9,10] We start with the proposition that when in the course of a legal warrantless search a police officer comes upon a suspicious object, he is entitled to inspect it and, if it consists of fruits, instrumentalities or evidence of crime, to seize it, even though the crime was not that which justified the search. Harris v. United States, supra, 331 U.S. 154-55, 67 S.Ct. 1098, 91 L.Ed. 1399;[7]

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7. Although Chimel v. California, supra, 395 U.S. at 768, 89 S.Ct. 2034, overruled Harris with respect to the permitted area of the search, it did not reflect on this holding, and Harris was cited for the proposition in United States v. Robinson, 414 U.S. 218, 236, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

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Abel v. United States, 362 U.S. 217, 234-40, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960); Coolidge v. New Hampshire, 403 U.S. 443, 465-66, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (plurality opinion); United States v. Robinson, 414 U.S. 218, 236, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed. 2d 456 (1973); United States v. Duckett, 583 F.2d 1309, 1312-13 (5th Cir. 1978); United States v. Bertucci, 532 F.2d 1144, 1146 (7 Cir.), cert. denied, 429 U.S. 895, 97 S.Ct. 256, 50 L.Ed.2d 178 (1976); United States v. Bell, 464 F.2d 667, 674 (2 Cir.), cert. denied, 409 U.S. 991, 93 S.Ct. 335, 34 L.Ed.2d 258 (1972); cf. United States v. Pugh, 566 F.2d 626, 627-28 (8 Cir. 1977), cert. denied, 435 U.S. 1010, 98 S.Ct. 1885, 56 L.Ed.2d 393 (1978); United States v. Rollins, 522 F.2d 160, 166 (2 Cir. 1975), cert. denied, 424 U.S. 918, 96 S.Ct. 1122, 47 L.Ed.2d 324 (1976); United States v. Wysocki, 457 F.2d 1155, 1160-61 (5 Cir.), cert. denied, 409 U.S. 859, 93 S.Ct. 145, 34 L.Ed.2d 105 (1972); United States v. Patterson, 447 F.2d 424, 427 (10 Cir. 1971), cert. denied, 404 U.S. 1064, 92 S.Ct. 748, 30 L.Ed.2d 752 (1972); United States v. Simpson, 453 F.2d 1028 (10 Cir.), cert. denied, 408 U.S. 925, 92 S.Ct. 2504, 33 L.Ed. 2d 337 (1972); United States v. Garner, 451 F.2d 167 (6 Cir. 1971); and United States v. Gomori, 437 F.2d 312 (4 Cir. 1971). This principle readily sustains the reading and seizure of the Studio 1 records, loose ledger sheets whose value as evidence of crime was apparent on their face. Even if the Government were here obliged to rely on the "plain view" doctrine, seizure of these sheets met the two express limitations stated by Mr. Justice Stewart in Coolidge v. New Hampshire, supra, 403 U.S. at 467-71, 91 S.Ct. 2022, namely, that a lawful search must be in progress and that the discovery of the

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evidence must be inadvertent, as well as the condition, 403 U.S. at 466-67, 91 S.Ct. at 2038, that "the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them."[8] We reach the same conclusion with respect to what the parties speak of as "index cards", an appellation conveying a greater sense of formality than is warranted. Compare United States v. Teller, supra, 412 F.2d at 379. These cards, which also appear to have been loose, are full of writings describing loans and payments.

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8. The panel in United States v. Berenguer, 562 F.2d 206, 210 (2 Cir. 1977), rephrased this to read "its incriminatory nature must be immediately apparent". We applied this seemingly stricter formulation in United States v. Diaz, 577 F.2d 821, 833 (2 Cir. 1978), but found this condition to be satisfied. In so confused an area, it seems best to stick to the exact language of the Supreme Court's plurality opinion rather than to embroider on it even slightly.

The court has given little guidance as to what it meant by the phrase quoted in text. Justice Stewart, in Coolidge, cites his concurring opinion in Stanley v. Georgia, 394 U.S. 557, 569-72, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), where three Justices concurring would have found unlawful a search in which police , after discovering film reels during a search pursuant to warrant for evidence of bookmaking, viewed the films (on a projector on the premises) and seized them as obscene. See also United States v. Hunt, 366 F.Supp. 172, 181 (N.D.Tex.1973), rev'd on different grounds , 505 F.2d 931 (5 Cir. 1974). Short of this, the question seems to have been raised only in two dissents from denials of

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certiorari. See Sedillo v. United States, 419 U.S. 947, 95 S.Ct. 211, 42 L.Ed.2d 168 (1974) (Douglas J., dissenting); Gentile v. United States, 419 U.S. 979, 980 n.1, 95 S.Ct. 241, 42 L.Ed.2d 191 (1974)(Douglas J., dissenting).

A number of courts, including this one, have upheld without much discussion the seizure of documents during an otherwise valid search as in "plain view" notwithstanding the fact that some perusal, generally fairly brief, of the documents was clearly necessary in order for the police to perceive the relevance of the document to crime. Mapp v. Warden, 531 F.2d 1167, 1172 (2 Cir. 1976), cert. denied, 429 U.S. 982, 97 S.Ct. 498, 50 L.Ed.2d 592 (1976)(rent receipts); United States v. Pugh, supra, 566 F.2d 626, 637-38 (log of drug distributions seized after view of book entitled "Cocaine Users Handbook"); United States v. Parker, 530 F.2d 208, 210-11 (8 Cir. (1976) (ledger book); United States v. Gargotto, 476 F.2d 1009, 1013-15 (6 Cir. 1973), aff'd after remand, 510 F.2d 409 (6 Cir. 1974), cert. denied, 421 U.S. 987, 95 S.Ct. 1990, 44 L.Ed.2d 477 (1975) (betting records seized during arson investigation); United States v. Damitz, 495 F.2d 50 (9 Cir. 1974) (notebook used for recording drug weights); United States v. Smith, 462 F.2d 456, 461 (8 Cir. 1972) (lease); United States v. Henkel, 451 F.2d 777, 781 & n.4 (3 Cir. 1971), cert. denied, 409 U.S. 859, 93 S.Ct. 144, 34 L.Ed.2d 104 (1972) (serial numbers); United States v. Maude, 156 U.S. App. D.C.378, 384-86, 481 F.2d 1062, 1069-71 (1973) (identification cards); United States v. Teller, 412 F.2d 374, 379 (7 Cir. 1969), cert. denied,

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402 U.S. 949, 91 S.Ct. 1603, 29 L.Ed.2d 118 (1971) (index cards with license numbers); United States v. Callabrass, 458 F.Supp. 964 (S.D.N.Y. 1978) (papers seized at scene of fire); United States v. Vallieres, 443 F.Supp. 186, 191 (D.Conn.1977) (address book in unzipped bag in trunk of car); United States v. Menke, 339 F.Supp. 1023, 1026 n.4 (W.D.Pa.), rev'd on different grounds, 468 F.2d 20 (3 Cir. 1972)(address book and mailing registry slip). See also United States v. Bennett, 409 F.2d 888, 896-97 (2 Cir. 1969), cert. denied, 396 U.S. 852, 90 S.Ct. 113, 24 L.Ed.2d 101 (1969); United States v. Jenkins, 496 F.2d 57, 72-74 (2 Cir. 1974), cert. denied, 420 U.S. 925, 95 S.Ct. 1119 (1975); Taylor v. State, 342 F.Supp. 911, 915 (D.Minn.1972), aff'd, 466 F.2d 1119 (8 Cir. 1972), cert. denied, 410 U.S. 956, 93 S.Ct. 1425, 35 L.Ed.2d 689 (1973); contra, In re Calandra, 332 F.Supp. 737, 745 (N.D. Ohio 1971), aff'd sub nom. United States v. Calandra, 465 F.2d 1218 (6 Cir. 1972), rev'd on different grounds, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). As this court has recently stated, "It would be absurd to require an investigator to be oblivious to that which would be apparent to anyone else with normal powers of observation." Mapp v. Warden, supra, 531 F.2d at 1172.

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Moreover, on one of the two cards submitted to us as samples, the very first entry records a loan to Debbie Frank [McElroy] for $1,500, repayable in 21 weekly payments of $100 each, and the other card seems to show a loan of $555 repayable in 5 weekly installments of $135.

[11, 12] By this time, the police had probable cause to believe that Ochs was engaged not only in trafficking in stolen travelers' checks and carrying a gravity knife, but also in the conduct of a house of prostitution and a large scale and possibly illegal lending operation. The police were entitled to glance through the bankbooks and the two notebooks to ascertain whether they constituted evidence or instrumentalities relating to the stolen travelers' check ring. United States v. Frick, supra, 490 F.2d at 669-70. But even if they were not, the closed records had become highly suspicious in light of the information provided by the open ones. When the police opened the four bankbooks, their suspicions were reasonably heightened by the fact that three of these were in names other than those of Ochs and Narday. See United States v. Duckett, supra, 583 F.2d at 1312-13; United States v. Sedillo, 496 F.2d 151 (9 Cir. 1974), cert. denied, 419 U.S. 947, 95 S.Ct. 211, 42 L.Ed.2d 168 (1974). With so much in the way of cause to believe in Ochs' widespread participation in criminal activities, inspection and seizure of the two notebooks showing loan transactions did not violate the command of the plurality opinion in Coolidge that "the 'plain view' doctrine may not be used to extend a general exploratory search

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from one object to another until something incriminating at last emerges," 403 U.S. at 466, 91 S.Ct. at 2038, even if the Government had to rely on it. On the contrary, the police here advanced from incriminating object to incriminating object. Even under the plain view doctrine in the incriminating nature of an object is generally deemed "immediately apparent" where police have probable cause to believe it is evidence of crime. See, e.g., United States v. Duckett, supra, 583 F.2d at 1313-14; United States v. Johnson, 541 F.2d 1311, 1316 (8 Cir. 1976); United States v. Clark, 531 F.2d 928, 932 (8 Cir. 1976); United States v. Truitt, 521 F.2d 1174, 1176-77 (6 Cir. 1975); United States V. Blake, 484 F.2d 50, 57 (8 Cir. 1973), cert. denied, 417 U. S. 949, 94 S.Ct. 3076, 41 L.Ed.2d 669 (1974); United States v. Benn, 441 F.Supp. 1268 (E.D.N.Y.1977). Although one court has suggested that more than probable cause is required, see United States v. Smollar, 357 F.Supp. 628, 632 (S.D.N.Y.1972), even that court did not require that officers be "absolutely certain" that they have evidence before them. Id. They may test their belief by proceeding with a limited inspection of the "incriminating object." See, e.g., United States v. Pugh, supra, 566 F.2d at 627-28; United States v. Duckett, supra, 583 F.2d at 1313; Mapp v. Warden, supra, 531 F.2d at 1172; United States v. Patterson, supra, 447 F.2d at 427; United States v. Damitz, supra, 495 F.2d at 56; United States v. Blake, supra, 484 F.2d at 57; United States v. Smollar supra, 357 F.Supp. at 63. Surely the police in this case had probable cause to believe that the remaining records might constitute further evidence of any one of the several crimes that had been progressively unfolding before their

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eyes. Prostitution and loansharking are crimes that demand record keeping, and the proximity of these closed records to the clearly incriminating loose records in the very same briefcase gave the police probable cause to believe that the closed records might contain evidence relating to the crimes already discovered. The standard for probable cause in the seizure of documents appears to be the same as it is with respect to any other seizure of "mere evidence" —i.e., probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In this examination, consideration of police purposes is required. Warden v. Hayden, 387 U. S. 294, 307, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); Andresen v. Maryland, 427 U.S. 463, 483, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). Here it seems clear that the police had probable cause to seize the records as potentially constituting evidence or instrumentalities relating to any one of three "particular" crimes.

[13] Under all these circumstances, it would outrage common sense and human nature to read the Fourth Amendment to require that after having lawfully opened the briefcase and inspected the Studio 1 ledger sheets, the cards and at least the front sheets of the bankbooks, the police should be required to interrupt their work and apply for a warrant before going further, particularly when there was no telling when Narday might show up and demand the return of the car and its contents. See Lowe v. Caldwell, 367 F.Supp. 46, 53 n. 11 (S.D.Ga.1973), vacated and remanded sub nom. Lowe v. Hopper, 501 F.2d 952 (5 Cir. 1974), adhered to, 400 F.Supp. 970 (S.D.Ga.), aff'd, 520

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F.2d 1045 (5 Cir.1975).

What gives a certain amount of pause about this case is that the material seized by the police in their Chambers-justified investigative inspection of the briefcase was not hardware or contraband but records. Under the old rule of United States v. Lefkowitz, 285 U. S. 452, 465-66, 52 S.Ct. 420, 76 L.Ed. 877 (1932), the search of the briefcase could not lawfully have encompassed "mere evidence". When the rule was abrogated in Warden v. Hayden, 387 U.S. 294, 303, 87 S.Ct. 1642, 1648, 18 L.Ed.2d 782 (1967), the Court noted that the items there at issue were not "testimonial" or "communicative" in nature and that it was thus not required to "consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." We gave some attention to this problem in United States v. Bennett, supra, 409 F.2d at 895-97, without being required to resolve it. The Supreme Court has recently held in Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976), that a proper search and seizure, pursuant to a warrant, of a defendant's incriminating business records which had been voluntarily reduced to writing offended no Fifth Amendment interests of the defendant. Id. at 474-77,96 S.Ct. 2737. The Court found that, provided the search and seizure met the requirements of the fourth amendment's warrant clause, privacy interests are adequately protected. See Note, Formalism, Legal Realism, and Constitutionally Protected Privacy under the Fourth and Fifth Amendments, 90 Harv.L. Rev. 945, 979 (1977). The Court in Andresen did not address the question of warrantless searches for documents which fall

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within recggnized exceptions to the warrant requirement. Since Ochs has not raised the question, we see no reason to do so here.[10]

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9. The documents listed in the warrant in Andresen were evidence of a real estate fraud and were limited to dealings relating to a single lot (13T). Some documents were seized which related to a different lot, and these documents were used "to secure additional charges" against the defendant. Id.427 U.S. at 484, 96 S.Ct.2737. However, the Court found that the documents were within the warrant, since they would have been admissible with respect to lot 13T as "proof of similar acts is admissible to show intent." Id. at 483, 96 S.Ct. at 2750.

10. In view of our conclusion we find no need to consider an alternative theory propounded by the Government on the basis of United States v. Zaicek, 519 F.2d 412 (2 Cir. 1975). Relying on a supposed analogy to cases arising under federal and state statutes forfeiting vehicles which carry contraband, see United States v. Francolino, 367 F.2d 1013 (2 Cir. 1966), cert. denied, 386 U.S. 960, 87 S.Ct. 1020, 18 L.Ed.2d 110 (1967), and Cooper v. California, 386 U.S. 58, 87 S.Ct.788, 17 L.Ed.2d 730 (1967), the majority in that case held that when a car had been seized at the request of the owner under § 424(3) of New York's Vehicle & Traffic Law, which grants a police officer "power to seize any motor vehicle . . . when there is good reason to believe that such motor vehicle . . .

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II. Claims of Trial Error

Ochs mounts a series of attacks on the conduct of the trial. These deserve only brief treatment.

[14-17] The first objection relates to the admission of "prejudicial" evidence of Ochs' engagement in loansharking and prostitution. This evidence was directly relevant to Count Seven which charged Ochs with evading federal income taxes on "income derived from extortion, loansharking and prostitution," United States v. McGrath, 558 F.2d 1102 (2 Cir. 1977), cert. denied, 434 U.S. 1064, 98 S.Ct. 1239, 55 L.Ed. 2d 765 (1978); United States v. Eliano, 522 F.2d 201 (2 Cir. 1975), and also afforded necessary background to the obstruction of justice count. See United States v. Weiss, 491 F.2d 460, 466-67 (2 Cir.), cert. denied, 419 U.S. 833, 95 S.Ct. 58, 42 L.Ed.2d 59 (1974). Objection to admission of a tape recording of Ochs'

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has been stolen . . . .", the vehicle and its contents were subject to search since the police had a possessory interest superior to the thief's. Here Ochs had not stolen the car, and we are far from satisfied that the police had probable cause to think he had. Indeed, it is questionable that they really did; when they arrived at the precinct station, no further effort was made to ascertain from the National Crime Information Computer whether the Cadillac was on the list of stolen cars.

Other theories advanced by the Government, even if sound, would lead it no further than does the application of Chambers v. Maroney.

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attempt to bribe Officer O'Malley to perjure himself about where and how the knife was found in the Cadillac is likewise without merit. The attempted bribery was admissible as showing consciousness of guilt, see United States v. Cirillo, 468 F.2d 1233, 1240 (2 Cir. 1972), cert. denied, 410 U.S. 989, 93 S.Ct. 1501, 36 L.Ed.2d 188 (1973), and as an act of concealment relevant to the charge of willful evasion of income taxes in Count Seven. Barcott v. United States, 169 F.2d 929, 932 (9 Cir. 1948). There is equally little merit in the claims of error in allowing the Government to bring out that Debbie Frank McElroy, one of the victims of Ochs' extortion, had been a prostitute. It was her decision to quit the oldest profession that led to her falling into default, the consequent threats, and her return to Studio One to earn money to repay Ochs. Again we see no possible merit in the claim that it was error to allow numerous debtors to testify that Ochs instructed them to mail remittances to "Gambino" at a Bronx address. If Ochs chose to make false use of the name of a well-known underworld figure to instill fear, he must bear the consequences. United States v. Cirillo, supra, 468 F.2d at 1240; United States v. Zito, 467 F.2d 1401, 1405 (2 Cir. 1972).

[18-20] Ochs next complains of the trial court's denial of his motion to sever the tax counts under F.R.Cr.P. 14.[11]

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11. Ochs did not raise the question of misjoinder under F.R.Cr.P.8.

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It now appears, in light of our recent decision in United States v. Halper 590 F.2d 422 (2 Cir. 1978), subsequent to the argument in this case, that if the trial court had been presented with a proper claim of misjoinder pursuant to F.R.Cr.P. 8(a), it might have been required to grant a severance as a matter of law. In Halper, it was held that, on the facts of that case, joinder of counts of tax evasion and Medicaid fraud would be improper under F.R.Cr.P. 8(a) and that the error was prejudicial. We need not determine whether Halper would be applicable here. Since Ochs failed to challenge the indictment below for misjoinder under F.R.Cr.P. 8(a), he has waived that objection. F.R.Cr.P. 12(b)(2); 8 Moore, Federal Practice ¶ 12.03[2] (1978 ver.). Furthermore, it is well-settled in this circuit that the "harmless error" doctrine, F.R.cr.P. 52(a), applies in cases of misjoinder. See, e.g., United States v. Turbide, 558 F.2d 1053, 1061 (2 Cir.), cert. denied, 434 U.S. 934, 98 S.Ct.421, 54 L.Ed.2d 293 (1977); United States v. Granello, 365 F.2d 990, 995 (2 Cir. 1966), cert. denied, 386 U.S. 1019, 87 S.Ct. 1367, 18 L.Ed.2d 458 (1967). Misjoinder is typically found harmless where evidence tending to prove the charge that should have been severed would nevertheless have been admissible at the severed trial. United States v. Turbide, supra, 558 F.2d at 1061; United States v. Granello, supra, 365 F.2d at 995. Since we find that to be the case here, see text infra, any misjoinder error here would have been harmless even if Ochs had preserved his objection.

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To obtain reversal, Ochs must show that the refusal to sever was so unfairly prejudicial as to constitute an abuse of discretion. As we have recently noted, "'[W]e are reluctant to overturn a conviction for denial of a motion for severance unless there is a showing of substantial prejudice . . . . It is not sufficient merely to show that the accused would have had a better chance for acquittal at a separate trial'" United States v. Lyles, 593 F.2d 182, 189 (2 Cir. Jan. 31, 1979) (quoting) United States v. Stirling, 571 F.2d 708, 733 (2 Cir.), cert. denied, —— U.S. ——, 99 S.Ct. 93, 58 L.Ed.2d 116 (1978)); see also United States v. Corr, 543 F.2d 1042, 1052 (2 Cir. 1976); United States v. Papadakis, 510 F.2d 287, 300-01 (2 Cir.), cert. denied, 421 U.S. 950,95 S.Ct.1682,44 L.Ed.2d. 104 (1975).

[21] We find no "substantial prejudice" here. Most, if not all, of the evidence on the extortion and obstruction of justice counts would have been admissible on the evasion of taxes count, and the joinder of the latter was not prejudicial as to the former. See United States v. McGrath, supra, 558 F.2d at 1106. The false exemption counts were sufficiently discrete that we see no danger of prejudicial spill-over.

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Ochs' claim that he would have testified on the false exemption counts if they had been severed is advanced for the first time in this court and thus need not be considered.[12]

[22] The argument of insufficiency of the evidence on the extortion count, also raised for the first time on appeal, borders on the frivolous. It is unnecessary to go beyond the evidence, first communicated in slightly different terms through a friend and then directly, that if McElroy did not pay up, "she is going to have a broken head and be found floating in the river."[13]

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12. Beyond this, as the Government points out, it is hardly likely that Ochs, with five felony convictions which could have been used for impeachment, would have taken the stand even on a trial limited to the false exemption counts and, if he had any defense; the alleged wives and children were available as witnesses.

13. This aquatic threat seems to be quite venerable, see United States v. Kennedy, 291 F.2d 457, 459 (2 Cir. 1961).

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Equally meritless is Ochs' claim relating to a stipulation entered into between Ochs and the Government in connection with the false exemption claims. This stipulation stated that an official of a "New York agency" would testify that during an eighteen-month period when Ochs was required to make a statement regarding his marital status, dependents and place of residence, he gave no indication that he was married or had children. Ochs argues that this might have led a juror to speculate that the "agency" was a prison or parole authority, as in fact it was. In framing the stipulation, the Government and the court went far beyond anything required of them, as did the court in instructing the jury, to bring the danger of prejudice to Ochs as near to zero as was possible.

III. Claims of Error in the Charge

[23] Although no exception was taken at the trial, Ochs now objects to a portion of the charge on the obstruction of justice count:

> The indictment specifically charges the defendant with 'corruptly' endeavoring to influence the designated witness or witnesses. The word 'corruptly' does not add an additional element to the crime. I charge you as a matter of law that any unauthorized endeavor to influence a witness in the performance of his duty to testify violates the law. It is the endeavor, not the corruption, which is the gist of the crime.

Since the statute defines the offense, 18 U.S.C. § 1503, as:

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> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States . . . shall be fined . . . or imprisoned . . ."

we do not understand why the judge said what he did. If, as the Government suggests, he was trying to explain that the crime lay in the endeavor even if it did not succeed, the language was not apt to that end. However, he had previously said:

> The defendant must corruptly endeavor, that is deliberately and by his action, to influence the witness to testify falsely, evasively, or to corruptly have the witness assert their [sic] Fifth Amendment privilege when otherwise they would testify.

and added immediately after the challenged instruction that:

> [a]ny . . . endeavor, whether successful or not, which is made for the purpose of corruptly influencing a witness is condemned.

We therefore do not regard the charge as plain error requiring reversal in the absence of objection.

[24] The only other objection to the charge deserving comment relates to the tax evasion count. The judge instructed that in the absence of contrary agreement between debtor and creditor, payments are first to be applied to interest. Ochs contends that this deprived him of his defense that he believed he was entitled to treat repayments on legally unenforceable usurious loans as a return of principal until payments exceeding that sum were received. At best the point would cover only

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a small portion of the unreported income. In view of this and of other factors urged in the Government's brief, we find no prejudicial error.

IV. Attack on the Sentence

[25] Ochs contends that the imposition of consecutive terms of three years, the maximum permissible, on the three false exemption counts, was so irrational and consequently such a manifest abuse of discretion as to be within this court's power to correct. See United States v. McCord, 466 F.2d 17 (2 Cir.1972), and cases there cited. He claims that the false exemptions amounted to only $2,500 per count; that the general practice in the Southern District of New York is to impose only suspended sentences and fines for such offenses; and that it was irrational to impose what amounted to a nine-year sentence for these minor offenses as compared with a two-year sentence for the more serious crime of tax evasion, I.R.C.§ 7201. Ochs also suggests that the heavy sentence on the false exemption counts may have been due to the court's having "structured its sentence to immunize the maximum amount of custodial time from any reversal as to the suppression issue . . ." and invokes United States v. Ramos, 572 F.2d 360 (2 Cir.1978).

We are not disposed to use this case to test the limits of our power with respect to sentences that are within legal limits and are not shown to have been based upon materially inaccurate information. Judge Cooper was dealing not with a man who had simply yielded to the temptation to cheat the Government of income taxes by claiming false exemptions but with an individual whose whole life from the age of 16 to his then age of 48 had shown a contemptuous disregard for law. After serving

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jail sentences and being released on parole, he repeatedly violated parole by committing new crimes. On the undisputed record disclosed in the presentence report, the judge could reasonably have given Ochs an even higher total sentence than he did. Particularly in light of our disposition of the suppression claim, we are not concerned with how the sentence was structured.

We have considered many other claims of error but do not deem them worthy of discussion.

Affirmed.

MESKILL, Circuit Judge (concurring):

I concur in the result announced today and in parts II, III and IV of Judge Friendly's opinion.

Justice Rehnquist observed in Cady v. Dombrowski, 413 U. S.433, 440, 93 S.Ct. 2523, 2527, 37 L.Ed.2d 706 (1973), that the law governing warrantless searches and seizures, especially those involving vehicles, "is something less than a seamless web." So serious is the confusion that six years after Cady it can fairly be said that the law in this area is developing without any predictability or even discernible direction. Warrantless vehicle search cases shed virtually no light on fact situations which, if one were to attempt to apply the usual methods of legal reasoning, would seem to be distinquishable only on the basis of trivialities. Thus the precedents cast shadows rather than light, making the resolution of each succeeding case less rather than more certain.

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In the two years since the Supreme Court held unreasonable the warrantless search of a footlocker removed by federal agents from the trunk of an automobile, United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), the lower federal courts have been unable to harmonize their approaches to searches of flight bags, suitcases, and other containers removed from automobiles. See, e.g., the following cases, all of which either involved a post-Chadwick search or assumed or held Chadwick to apply retroactively: United States v. Neumann, 585 F.2d 355 (8th Cir. 1978) (post-Chadwick warrantless search, on the scene, of closed but unsecured Dayton's Department Store box removed from vehicle after arrest of occupants, held reasonable as either investigative or inventory search, distinguishing Chadwick); United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978) (en banc, reversing panel decision reported at 578 F.2d 204 (1977)), petition for cert. filed, 582 F.2d 1175 (1978) (pre-Chadwick warrantless investigative search, on the scene, of suitcase removed from back of station wagon held unreasonable, citing Chadwick); United States v. Finnegan 568 F.2d 637 (9th Cir. 1977) (pre-Chadwick warrantless investigative search, on the scene, of closed suitcase removed from hatchback of vehicle held reasonable, citing Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), and distinguishing Chadwick); United States v. Hill, 458 F. Supp. 31 (D.D.C.1978) (post-Chadwick warrantless inventory search, at police station, of open flight bag removed from locked trunk of impounded vehicle held unreasonable, citing Chadwick).

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See also Sanders v. State, 262 Ark. 595, 559 S.W.2d 704 (1977), cert. granted, --- U.S. ---, 99 S.Ct. 247, 58 L.Ed.2d 236 (1978) (pre-Chadwick warrantless search, on the scene, of suitcase removed from trunk of taxicab held unreasonable, citing Chadwick). Clearly, when the precedents in such a crucial area of constitutional law offer so little guidance that it is difficult to choose between opposite results on the basis of superior reasoning, our ability to dispense justice is severely hampered. Nevertheless, we are obligated to decide the appeals that come before us.

I concur in today's result but I take a different path from that followed by Judge Friendly. Given the state of the law, Judge Friendly's analysis cannot be rejected as implausible, although I think it may underestimate the intended impact of Chadwick on Chambers. I prefer to leave exploration of the effect of Chadwick on vehicle searches, whether "inventory" or "investigative" for a case to which Chadwick is clearly applicable.

Shortly after Chadwick was handed down, this Court held that the decision was not to be given retroactive effect. United States v. Reda, 563 F.2d 510 (2d Cir. 1977), cert. denied, 435 U.S. 973, 98 S.Ct. 1617, 56 L.Ed.2d 65 (1978). See also United States v. Diaz, 577 F.2d 821, 824 (2d Cir. 1978). The Reda panel relied on United States v. Peltier, 422 U.S. 531, 95 S.Ct. 3213, 45 L.Ed.2d 374 (1975), in which the Supreme Court addressed the question of the retroactive application of exclusionary rule decisions. The Peltier Court reasoned that neither the judicial integrity rationale nor the deterrence of police misconduct rationale would justify retroactive exclusion of

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evidence seized by law enforcement officers who reasonable believed in good faith that their search was in accordance with the law, even though decisions subsequent to the search have broadened the exclusionary rule to encompass evidence seized in that manner. To date, three courts of appeals besides our own have read Peltier to bar the retroactive application of Chadwick. United States v. Choate, 576 F.2d 165, 182 n.20 (9th Cir.) cert. denied, —— U.S. —— 99 S.Ct. 350, 58, L.Ed.2d 344 (1978); United States v. Berry, 571 F.2d 2 (7th Cir. 1978); United States v. Montgomery, 558 F.2d 311 (5th Cir. 1977). But see United States v. Schleis, 582 F.2d 1166 (8th Cir. 1978) (en banc).[1]

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1. In June of 1977 the Supreme Court vacated a judgment of the Court of Appeals for the Eighth Circuit, involving a 1974 briefcase search, 543 F.2d 59 (1976), and remanded for further consideration in light of Chadwick. Schleis v. United States, 433 U.S. 905, 97 S.Ct. 2968, 53 L.Ed.2d 1089 (1977). I do not read the Schleis remand as an indication that Chadwick is necessarily to be given retroactive effect. Four courts of appeals have held Chadwick not retroactive. United States v. Montgomery, 558 F.2d 311, (5th Cir. 1977); United States v. Reda, 563 F.2d 510 (2d Cir. 1977), cert. denied, 435 U.S. 973, 98 S.Ct. 1617, 56 L.Ed.2d 65 (1978); United States v. Berry, 571 F.2d 2 (7th Cir. 1978); United States v. Choate, 576 F.2d 165, 182 n.20 (9th Cir. 1978). See also United States v. Powell, 449 F.Supp. 562 (E.D.Pa. 1978).

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Since the Supreme Court has not as yet passed on the retroactivity of Chadwick, Reda is the law of this Circuit. Thus there is no need today to assess the impact of Chadwick on warrantless vehicle searches, either "investigative" or "inventory."

Putting Chadwick aside and viewing the law as it stood at the time of the search, I see no reason why the itemizing of the contents of Ochs' briefcase should not be regarded as having been performed pursuant to a legitimate inventory search.

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Each of these cases was decided after the Supreme Court remanded the Schleis case to the Eighth Circuit for consideration in light of Chadwick (which had been decided six days before the remand was ordered). But see United States v. Schleis, 582 F.2d 1166, 1173-74 & n.6 (8th Cir. 1978) (viewing remand as direction to apply Chadwick retroactively). Compare Winkle v. Bannan, 368 U.S. 34, 82 S.Ct. 146,7 L.Ed.2d 91 (1961), remanding case for consideration in light of Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Four years after Winkle in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), the Supreme Court, acting with the benefit of the previously expressed and conflicting views of six courts of appeals, held Mapp not to apply to state court convictions which, like the conviction in Winkle, had become final before Mapp was decided.

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Three years ago, in South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), the Supreme Court upheld as reasonable the inventory search of a vehicle properly taken into police custody, and the incriminating evidence found in the glove compartment was held admissible at trial. In the instant case, the trial court found that, as in Opperman, the "vouchering" or invoicing of property coming into police custody was standard departmental procedure at the time the search was made. There was simply no reason for the officers to suspect that the warrantless opening of Ochs' briefcase stood on a different constitutional footing than the warrantless opening of the glove compartment or the trunk. In the years preceding Chadwick several courts of appeals writing both before and after Opperman failed to appreciate the distinction, between containers built into vehicles (e.g., trunks and glove compartments) and removable containers found within vehicles (e.g., footlockers), that was subsequently drawn by Chadwick. See, e.g., United States v. McCambridge, 551 F.2d 865 (1st Cir. 1977) (warrantless search at police station, of stolen suitcase taken from automobile, held reasonable under both Opperman and Chambers). See also United States v. Friesen, 545 F.2d 672, 673-74 (9th Cir. 1976) cert. denied, 433 U.S. 911, 97 S.Ct. 2980, 53 L.Ed.2d 1096 (1977) ("Where property is validly held by law enforcement officers for which they may have responsibility, it seems a useless gesture, whether it be an automobile or a suitcase, to require a search warrant to effect an inventory of the property."); United States v. Diggs, 544 F.2d 116, 125 (3d Cir. 1976) (Gibbons J., concurring)

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("Since the agents were lawfully in possession of the box, it seems to me that they were authorized to make an inventory search . . . . No principled distinction . . . can be made for inventory search purposes between lawful possession of a car and lawful possession of a box.") (emphasis added; citation omitted) (reversed in United States v. Diggs, 569 F.2d 1264 (3d Cir. 1977) (Gibbons, J.), holding search unreasonable, on appeal after remand because found to have been conducted for investigative rather than for inventory purposes); United States v. Giles, 536 F.2d 136, 140 (6th Cir. 1976) (warrantless inventory search of luggage removed from automobile trunk after arrest of driver upheld); United States v. Zaicek, 519 F.2d 412 (2d Cir. 1975) (warrantless search at headquarters of attache case removed from stolen vehicle seized by police upheld); United States v. Soriano, 497 F.2d 147, 149 (5th Cir. 1974) (en banc) (upholding warrantless investigative search, on the highway, of suitcase taken from vehicle; "though it is true that the [Chambers] Court spoke of an automobile while we treat of containers in or just removed from one, the principle is not different"); United States v. Gravitt,484 F.2d 375, 378 (5th Cir. 1973), cert. denied, 414 U.S. 1135, 94 S.Ct. 879, 38 L.Ed.2d 761 (1974) ("when the police take custody of any sort of container — be it an automobile, suitcase, or any other thing in which property may be stored — it is reasonable to search the container to itemize the property to be held by the police") (cited in Opperman, supra, 428 U.S. at 371, 96 S.Ct. at 3098).

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Chadwick, by distinguishing for Fourth Amendment purposes the intrusiveness of a search from that of a seizure, and by distinguishing among types of containers, introduces new considerations that may in future cases affect our view of the proper scope of both warrantless inventory searches of vehicles in police custody and warrantless investigative searches of vehicles. However, to my mind, the search of Ochs' briefcase was reasonable under the then-prevailing interpretation of the Fourth Amendment. I agree with Judge Friendly that having lawfully opened the briefcase, the officers were justified in seizing the clearly incriminating evidence that was in plain view. Under Peltier and Reda it would be inappropriate to exclude the evidence turned up in the course of this search.

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OPINION OF THE SOUTHERN DISTRICT OF NEW YORK IN UNITED STATES V. OCHS,
461 F. Supp. 1 (S.D.N.Y. 1978)

MEMORANDUM JAN. 11, 1978

OPINION APRIL 7, 1978

MEMORANDUM

IRVING BEN COOPER, District Judge

The defendant moves pursuant to Rules 41(f) and 12(b), Federal Rules of Criminal Procedure, to suppress the contents of two briefcases seized and searched on September 5, 1975 by the New York City Police. After a full hearing before us on December 13 and 20, 1977, the within motion is hereby denied in its entirety.

Our ruling is predicated primarily on the following succinct recital: (1) The defendant has standing to contest the admissibility of the seized articles on the basis of Fourth Amendment safeguards. See, e. g., Mancusi v. DeForte, 392 U.S. 364, 368, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968); Jones v. United States, 362 U.S. 257, 261, 80 S.Ct. 725, 4 L.Ed. 2d 697 (1960). (2) There was probable cause to arrest the defendant. See, e.g., Bringar v. United States, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 93 L.Ed. 1879 (1948); N.Y. Crim. Proc. L. § 140.10 (McKinney 1971) (warrantless arrest). (3) The impounding of the car was proper under standard New York City Police Department procedures. See, e. g., People v. Kern, 67 Misc.2d 495, 324 N.Y.S.2d 442 (1971). (4) The inventory search of the car and briefcases was lawful. See, e. g., Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973); Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967).

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We plan to file a more detailed memorandum decision disposing of these and other issues presented.

OPINION

We found credible the evidence adduced by the Government at the open hearing we conducted on the defendant's application to suppress certain extremely vital evidence which came into the hands of the police after defendant Ochs was placed under arrest. The nature of this motion before us is such that we undertake[1] a somewhat detailed factual recital of what took place at the hearing.

While cruising in a patrol car on September 5, 1975 at approximately 4:30 P.M. in the vicinity of a department store, B. Altman & Company, Fifth Avenue and 35th Street, Manhattan, New York City, Police Officers John O'Malley (on the force 8½ years) and William Kelly were signaled to stop by Mr. Theodore Bielefeld, the assistant director of security of the store. He imparted to them right then and there information that proved to have a direct bearing on the issue of probable cause for the subsequent arrest of Ochs. We should promptly point out that he was well known to the officers. They had dealt with him in his official capacity as assistant security director of B. Altman. On over a dozen prior occasions Officers O'Malley and Kelly had arrested individuals in B. Altman for a variety of

1. With substantial help from the Government's (Assistant United States Attorney Sudler) memorandum.

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offenses including shoplifting, forgery, and burglary solely on information supplied to them by Mr Bielefeld. All arrests made upon information provided by Mr. Bielefeld have been upheld by the New York State Courts. Mr Bielefeld is himself a retired New York City Police Officer.

Bielefeld informed the officers that a ring of three male persons engaged in check-cashing stolen traveler's checks of the American Express Company had just passed such checks in the store; that two of them were then seated in a blue Cadillac automobile parked on East 35th Street (between Fifth and Madison Avenues), and the third, known to Bielefeld as Julian Mitchell,[2] was no longer in sight; that merchandise which had been purchased by Mitchell and members of his ring the day before was brought there for refund by Ochs the very next day (September 5) at about 4:00 P.M.; that Ochs entered the store, proceeded to the refund counter with the apparent intent of making a refund for cash. Perhaps because he was being followed by Bielefeld, Ochs became apprehensive and exited the store with the package without having received a refund.

2. Mitchell has an extensive prior criminal history of illicit activity of this kind and was well known to the security personnel at B. Altman, as well as the New York City Police

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Bielefeld also related he had followed defendant out of the Fifth Avenue door of the store and observed him walk in a northerly direction on that street. Ochs disappeared into a doorway on the east side of Fifth Avenue between 35th and 36th streets at which time Mr. Bielefeld flagged down Officers O'Malley and Kelly in their patrol car. Ochs then approached a dark blue, 1975 Fleetwood Cadillac (New York license no. 634-WFL) and entered that car which was parked on East 35th Street facing west.

Bielefeld showed O'Malley photostatic copies of the stolen American Express checks in the name of O. Grable that were cashed in the store the day before; also a photostatic picture of Mitchell.

The officers requested Bielefeld to see if the persons he mentioned were still in the automobile; he looked and reported affirmatively. The officers then pulled their patrol car in front of the Cadillac so as to preclude exit. They approached the automobile, O'Malley on the driver's side where Ochs sat, Kelly on the passenger's side(front) where one Liveo[3] was seated. Weapons were not drawn. When O'Malley first saw Ochs, he perceived that he fitted the description (furnished him by Bielefeld) of the man who attempted to obtain a refund on stolen merchandise that day.

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3. Louis Liveo was later named as a co-defendant in a state criminal action arising out of this arrest.

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Less than a minute thereafter, O'Malley observed the blade of an open knife on the front seat between Ochs and Liveo. O'Malley yelled that information to Kelly. One of them took the knife and upon its examination, by the officers right then and there,were satisfied that it was a gravity knife. Both knew it was a violation of New York State law to possess such an instrument open or closed.[4] The knife had a six inch handle that accommodated a sharp blade about that size. A gravity knife differs from a pen knife in that by depressing its button, accompanied by a flicking of the wrist, the blade exits the handle and locks into place. It can be opened and remain so without touching the lock. It is somewhat similar to a push-button switchblade knife without however the latter's spring to force the blade open; the force of gravity, and not a spring, forces the blade open and ends in a locked position.

Satisfied it was a gravity knife, the officers ordered Ochs and Liveo out of the car and directed them to place their hands on the roof of the car.

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4. New York Penal Law § 265.00(5) defines a gravity knife as "..... any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device." Possession of a gravity knife by any person who has previously been convicted of any crime is a class C felony. § 265.02(1). Ochs had five prior convictions at the time of his arrest.

At first Ochs and Liveo resisted the instructions and became belligerent. They soon changed their attitude. The officers frisked them but found nothing relevant to the search.

As O'Malley frisked Liveo down and reached his ankles, he noticed a black object on the left front wheel well floor. His first impression of it was a gun or weapon. He asked Liveo about it and received a negative answer. Thereupon, O'Malley reached in and took possession of an object that turned out to be a folded leather book of American Express traveler checks in the name of O. Grable, identical to the ones which had been used by Mitchell to purchase goods at Altman's on September 4 and 5, 1975.

During the next two minutes, the two were given their constitutional rights and the officers questioned Ochs about the ownership of the automobile; defendant responded it belonged to a friend whose whereabouts then he did not know. When asked, Ochs produced a New York State driver's license in his own name and a registration certificate for the vehicle in the name of Otto Narday. O'Malley noticed that the upper portion of the registration certificate had been tampered with, a "7" changed to an "f."

From Narday we learned that the car belonged to him. On frequent occasions he had borrowed from Ochs substantial sums (at one time $18,000; presently $12,000). On occasion Narday had difficulty paying defendant back. He had not "yet" transferred to Ochs the ownership of the car.

Since neither occupant was the owner, the registration certificate had been altered, neither occupant knew where the owner could be located, the gravity knife on the front seat, and Ochs fitted the description given by Bielefeld of the man who was a member of the stolen check-passing ring—all these factors gave the officers the impression that they were looking at a stolen car.

O'Malley tried to verify by radio the car's legal status,[5] but static interfered and prevented contact with the communications bureau. He succeeded in getting another police unit to attend; whereupon Ochs and Liveo were arrested, handcuffed and removed to the Midtown South station house. At no time on the way to the precinct did either man claim ownership of the property in the car; neither requested the officers not to examine or take possession of whatever was there.

Before leaving the scene of the arrest, O'Malley requested one of the policemen to transport the blue Cadillac to the precinct where it was "vouchered"[6] and an inventory made of the items in it.

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5. Such information is readily available to police officers through the National Crime Information Computer.

6. Vouchering, or the invoicing of property coming into police custody, is a standard police department procedure. See N.Y.P.D. Patrol Guide, Procedure No. 113-1 and 113-3. See also N.Y.P.D. Legal Division Bulletin, Vo.. 1, No. 20 concerning the seizure of contraband from an automobile during an inventory of such automobile's contents.

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The police procedure that prevailed at the time made it imperative that a police officer remove and impound[7] any automobile believed stolen and conduct an inventory search of all cars seized or illegally parked. This is done for the owner's safe-keeping as well as affording protection of the police department against false claims of missing property of any kind, also to determine the existence of explosives or weapons.

Ochs and Liveo were placed in the detention cell promptly. Approximately five to ten minutes later, O'Malley and Kelly left to search the vehicle and make an inventory of its contents. Among other things, the search yielded a .32 caliber starter's pistol, a simulated revolver, a scanning receiver (a device used to listen to police radio transmissions), one B. Altman's sweater, originally purchased with stolen traveler's checks by Mitchell on that day, a second book of stolen traveler's checks and two briefcases.

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7. The impoundment of a vehicle in which a dangerous weapon is found is standard New York Police Department procedure. Additionally, the officers had probable cause to believe that the car was stolen and that it had been used for the commission of a crime. They were also concerned about the unknown whereabouts of Julian Mitchell and his associates who might return and remove the car and its contents. Furthermore the officers could not leave the car where it was because it would constitute a traffic hazard. The car was illegally parked on a busy street during rush hour.

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The blue Cadillac itself was also vouchered along with the knife and the stolen traveler's checks seized during the arrest. The briefcases unlocked were found in the footwells of the back seat.

The briefcases were examined by the officers a few feet from where Ochs stood and in a position to observe the inspection. He engaged in small talk that included. "What do you guys think you're going to find?" The contents of the briefcases were carefully inventoried. O'Malley made sure they contained nothing harmful, i. e., a bomb, gun, other weapon, etc. Four bank books were found and listed, one listed this defendant as co-owner, the other three bore names other than defendant. Also removed were numerous sheets of paper, records and two small address books. No valuables, money, jewelry, securities were found.

Numerous entries filled the sheets and records; they related both to Studio 1 Massage Parlor and a money-loaning enterprise. O'Malley immediately recognized the parlor, for official business had brought him there on at least two occasions prior to September 5, 1975, the date of defendant's arrest in the instant case. It was, he was positive, an active house of prostitution. Entries on the paper sheets included names of girls and fees paid to the house. Other entries led O'Malley to conclude they related to "loan sharking" i.e., "old loan, new loan, paid, to be paid, that type deal," he testified.

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On the arraignment. (the day following) in state court of Ochs for possession of the gravity knife, he said to the officer, "What's this all about loan-sharking ... so I lend money to people. What's wrong with that?"

On September 24, 1975 Ochs was arraigned in federal court. Defendant's attorney there approached O'Malley and offered a bribe. He reported the incident to his superiors. Officers O'Malley and Kelly thereupon began a three-month undercover investigation which culminated in the arrest of the attorney and the rearrest of Ochs and Liveo on charges of bribery, conspiracy and obstruction of justice.

During this bribery investigation, Ochs paid O'Malley and Kelly $5,150.00 in return for which he demanded that the officers commit perjury by testifying to the events surrounding the inventory search of the blue Cadillac on September 5, 1975 in such a fashion that the search would be deemed illegal and in violation of his fourth amendment rights, thus causing the Court to suppress any evidence derived from that search. These conversations with Ochs were recorded and form the basis for the state charges of bribery, conspiracy, and obstruction which are presently pending against him in the Supreme Court of New York.

Procedure Applicable

Federal law governs the legal issues here presented. In Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960), a defendant in a federal criminal action sought to

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suppress certain evidence claiming that it was obtained when state police officers violated his fourth amendment rights. The Supreme Court considered whether state or federal law was applicable to defendant's constitutional claims:

> "The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." 364 U.S. at 224, 80 S.Ct. at 1447.

Accord, United States v. Bedford, 519 F.2d 650 (3d Cir. 1975), cert. denied, 424 U.S. 917, 96 S.Ct. 1120, 47 L.Ed. 323 (1976); United States v. Burke, 517 F.2d 377 (2d Cir. 1975); United States v. Scolnick, 392 F2d 320 (2d Cir.), cert. denied sub nom., Brooks v. United States, 392 U.S. 931, 88 S.Ct. 2283, 20 L.Ed.2d 1389 (1968); Preston v. United States, 376 U.S. 364 84 S.Ct. 881, 11 L.Ed.2d 777 (1964); cf. Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975).

[1-5] At the conclusion of the hearing on December 20, 1977, the defendant had still not satisfied his burden of showing that he had standing to make his motion to suppress the books and records seized by police officers during an inventory search of the car he was driving on September 5, 1975. The defendant could have easily satisfied this burden by submitting a simple possessory affidavit. This affidavit could not be used against him at trial. Simmons v. United States, 390 U.S. 377, 389-94, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

Instead the defendant has cited to the Court numerous cases in which a defendant has been held to have "automatic standing" where possession of the fruits of a search were part of the elements of the

crime charged. See, e.g., Jones v. United States, 362 U.S. 257, 263, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). Such is not the case here because Ochs is not charged with possession of loansharking or prostitution records. Rather the focus of the question must be whether Ochs has "actual standing" to contest the search of which he complains. In this regard it is settled that the fourth amendments prohibition against unreasonable searches and seizures protects a person's reasonable expectation of privacy from arbitrary official invasion, Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19L.Ed.2d 576 (1967); Camara v. Municipal Ct., 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); and only a person whose reasonable expectation of privacy has been invaded has standing to move to suppress any evidence seized as a result of the invasion. As stated in Jones v. United States, 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed.2d 697 (1960):

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.

Accord, Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). Stated somewhat differently, standing depends upon a defendant's having a relationship to, or interest in, either the premises searched or the property seized sufficient to warrant a finding that he was "a victim of a search or seizure."

[6] A person's standing to suppress evidence does not depend upon whether he has a property right in the invaded premises "but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." Mancusi v. DeForte, 392 U.S. 364, 368, 88 S.Ct. 2120, 2124, 20 L.Ed.2d 1154 (1968). Accord, Combs v. United States, 408 U.S. 224, 92 S.Ct. 2284, 33 L.Ed.2d 308 (1972); Katz v. United States, 389 U.S. 347, 352-53, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

[7] We uphold the Government's position that Ochs who had borrowed the blue Cadillac from Otto Narday, one of his loanshark victims (at one time he was $18,000 in debt to Ochs), did not have a reasonable expectation of privacy in the premises of the borrowed Cadillac. See, United States ex rel. Laws v. Yeager, 448 F.2d 74, 85 (3d Cir. 1971). cert. denied. 405 U.S. 976, 92 S.Ct. 1201, 31 L.Ed.2d 251 (1972) (occasional borrower of car used in robbery lacks standing); United States v. Graham, 391 F.2d 439 (6th Cir.), cert. denied, 393 U.S. 941, 89 S.Ct. 307, 21 L.Ed.2d 278 (1968) (no standing where car is in possession of another allegedly connected with same crime).

Given the testimony of Otto Narday it is probable that the Cadillac was taken by Ochs when Narday was unable to meet payments on loans from the defendant. Further, the automobile was used by Ochs for the commission of a crime and thus he had even less of an expectation of privacy in its premises.

It is questionable whether Ochs had standing to suppress the items seized during the inventory search.

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Evidentiary Rules

[8-10] The evidentiary rules at a suppression hearing are not applied with the same force which they command at trials. The Government has the burden of proving "by a preponderance of the evidence" that the search and seizure material is admissible at trial. United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). See Lego v. Twomey, 404 U.S. 477, 487-89, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972). In meeting that burden, Rule 1101(d)(1) of the Federal Rules of Evidence provides that those rules do not apply to the determination of questions of fact preliminary to the admission of evidence, and Rule 104(a)provides that a court in making such a determination is not bound by the rules of evidence except those with respect to privileges. Consequently, there is no automatic rule against receiving hearsay evidence in suppression hearings where the trial court itself can accord that evidence such weight deemed desirable. See United States v. Matlock, supra. In Matlock, the Court held that the trial judge, who in considering the validity of a third-party consent, had erred in excluding police testimony about the consenting party's extrajudicial statements as to her cohabitation with the defendant-owner of the premises searched, where these statements were consistent with each other, corroborated by other evidence, and made without malice and against her own penal interest. See United States v. Cirillo, 499 F.2d 872 (2d Cir.), cert. denied, 419 U.S. 1056, 95 S.Ct. 638, 42 L.Ed.2d 653 (1974) (need for suppression hearing).

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The Search of the Automobile Was Proper

[11] The police officer had probable cause to arrest Ochs on three distinct charges. First, we have the information given to the officers by Mr. Bielefeld that Ochs was part of a ring of individuals who were purchasing merchandise in B. Altman with Stolen traveler's checks and then refunding that merchandise for cash. Secondly the officer had probable cause to arrest him for possesion of a dangerous weapon (the open gravity knife) which they observed when they approached the blue Cadillac. Thirdly, there was probable cause to arrest defendant for car theft when he was unable to prove ownership of the Cadillac and produced a bogus registration. Under these circumstances, the police officers had no choice but to arrest the defendant, after which there were several reasons why the police officers were required to retain custody of the automobile wherein he was seated shortly before the arrest.

[12] First, that vehicle had been utilized by Ochs, Julian Mitchell, Louis Liveo and others unknown for the commission of a crime, and thus the officer had the duty to seize it. The defendant could have been charged at that point with the Criminal Possession of Stolen Property; Forgery; Possession and Uttering of Forged Instruments. See New York Penal Law. These violations, all of which were felonies, required that he be held for recording, fingerprinting and other preliminary police duties, New York Criminal Procedure Law § 140. 20-21(1), (5) (McKinney 1971). Since the car could not be left illegally parked on the well-travelled street during rush hour, while the defendant was being booked, it was necessary that it be brought into police custody and, therefore, be inventoried for the reasons set out below.

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Secondly, the vehicle had been used to transport a dangerous weapon, a gravity knife, which provided yet another independent ground for the seizure. Thirdly, and most significantly, Ochs was unable to produce a valid registration reflecting his ownership of the blue Cadillac; instead, he produced a tampered registration certificate in the name of Otto Narday. Under these circumstances, the officers had probable cause to believe the car stolen and thus had the duty to verify their belief. Because their radio was not working in that area, they had to remove the car to the police precinct. Furthermore, the car was illegally parked and constituted a traffic hazard. Under these circumstances, the seizure of the vehicle and its attendant inventory search were mandated.

The purpose of such an inventory search, as recently explained by the Supreme Court, is threefold: (1) to protect the items for the owner; (2) to protect the police against liability from claims of items being stolen; (3) to protect the public from dangerous instrumentalities which may be stored in the car. South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). These policies have been recognized by both the Supreme Court and the Circuit Courts on several occasions as both reasonable and not inconsistent with the defendant's constitutional guarantees under the fourth amendment. Texas v. White, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975); Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973); Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967); Cabbler v. Superintendent, 528 F.2d 1142 (4th Cir. 1975), cert. denied, 429 U.S. 817, 97 S.Ct. 60, 50 L.Ed.2d 77 (1976); Barker v. Johnson, 484 F.2d 941 (6th Cir. 1973); United

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States v. Gravitt, 484 F.2d 375 (5th Cir. 1973), cert. denied, 414 U.S. 1135, 94 S.Ct. 879, 38 L.Ed.2d 761 (1974); United States v. Mitchell, 458 F.2d 960 (9th Cir. 1972).

In Opperman, the police conducted an inventory search of a car impounded for multiple parking violations. Marijuana was discovered in the glove compartment; the use of it as evidence in a subsequent prosecution for possession of a controlled substance was upheld. Pointing up the well-established distinction between searches of homes and automobiles, the Supreme Court stated:

> Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office.
>
> * * * * * * * * * * * *
>
> Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements.
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> * * * * * * * * * * * *
>
> In the interests of public safety and as part of what the Court has called "community caretaking functions," Cady v. Dombrowski, supra, [413 U.S.] at 441, [93 S.Ct. at 2528] automobiles are frequently taken into police custody. Vehicle accidents present one such occasion.
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> * * * * * * * * * * * *

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Police will also frequently remove and impound automobiles which violate ordinances and which thereby jeopardize both public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.

[T]his court has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents.

. . . We conclude that in following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of the courts, the conduct of the police was not "unreasonable" under the Fourth Amendment.

428, U.S. at 365-67, 96 S.Ct. at 3096 (emphasis added).

The standard New York City police procedure used in searching the automobile is substantially the same used throughout the country; certainly the same approved in Opperman. Compare People v. Sullivan, 29 N.Y.2d 69, 73, 323 N.Y.S.2d 945, 272 N.E.2d 464 (1971) (wherein a description of New York City Police Dept. Procedures is given) with cases cited in South Dakota v. Opperman, 428 U.S. at 366, 96 S.Ct. 3092; see, e.g., United States v. Pennington, 441 F.2d 249 (5th Cir.), cert. denied, 404 U.S. 854, 92 S.Ct. 97, 30 L.Ed.2d 94 (1971); State v. Tully, 166 Conn. 126, 348 A.2d 603, 609 (1974); People v. Trusty, 183 Colo. 291, 516 P.2d 423, 425-26 (1973).

People v. Kern, 67 Misc.2d 495, 324 N.Y.S. 2d 442 (1971) contains a factual similarity with what confronts us here. In Kern, the defendant was

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legally arrested while sitting in his car on charges other than possession of stolen property. He and his car were taken to the stationhouse. While defendant was being booked, one of the arresting officers went out to "voucher" the car and its contents. Using the keys which had been left in the ignition, he opened the trunk and there saw several items of stolen office machinery. Defendant moved to suppress the machinery for use as evidence against him on the ground that it was obtained by an illegal search. His motion was denied by the Court:

> "Obviously, the police could not arrest defendant and leave his car unattended on the street. They were obliged by departmental regulation to hold the car and 'voucher' its contents in order to safeguard them. Rules & Procedures of the Police Department, chapter 24, Sec. 54.0. See People v. Granese, 32 A.D.2d 568, 300 N.Y.S.2d 215 (2d Dept.1969) (mem.)(dissenting opinion). The search of the car was reasonably related to compliance with that regulation. When he opened the trunk, the officer was neither seeking evidence against defendant nor doing more than what is minimally necessary to (voucher) the car's contents. Accordingly, as Cooper and Sullivan tell us, the search was justified without reference to the arrest or to probable cause. (I should note that this case is a fortiori to Sullivan. There, the police found a briefcase in the car and opened it. In short, they searched both the car and the briefcase. Here, they merely opened the trunk and saw the stolen property in plain view. In short, they searched only the car.)" Id. 324 N.Y.S.2d at 445.

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It seems clear to us that the search of the blue Cadillac was conducted for valid inventory purposes and thus any fruits of that search are admissible against Ochs.

The Automobile Was Subject to Forfeiture Under New York Law

[13] Because there was probable cause to believe that the blue Cadillac was stolen, that vehicle was subject to immediate seizure under Section 424(3) of the New York Vehicle and Traffic Law. Under these circumstances and whenever the police are required to maintain custody of a car for an indefinite period, whether because it was impounded or seized subject to a forfeiture statute, the car must be searched in order to insure the safety of the property within, as well as to protect society from dangerous instrumentalities. In Cooper v. California, 386 U.S. 58, 61-62, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967), the Supreme Court concluded:

> [i]t would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right , even for their own protection, to search it. It is no answer to say that the police could have obtained a search warrant, for "[T]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." United States v. Rabinowitz, 339 U.S. 56, 66, 70 S.Ct. 430, 435, 94 L.Ed. 653 . . . [W]e cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding.

APPENDIX B

Cooper, as well as several Second Circuit cases, see United States v. Zaicek, 519 F.2d 412 (2d Cir. 1975); United States v. La Vecchia, 513 F.2d 1210 (2d Cir. 1975); United States v. Capra, 501 F.2d 267 (2d Cir. 1974), cert. denied, 420 U.S. 990, 95 S.Ct. 1424, 43 L.Ed.2d 670 (1975), have distinguished the police department's interest in a car seized pursuant to a forfeiture statute from its interest in a car taken into custody at the time of an arrest solely for an unrelated crime. In Zaicek, the Court held that when the car is seized pursuant to a forfeiture statute, the police have "a greater possessory interest in the car than the owner." Zaicek, supra, 519 F.2d at 414.

[14] Thus, the police have a possessory, as well as an evidentiary interest in the car. These interests were found in Capra, supra, to allow a more thorough search than a perfunctory inventory search made of any car taken into police custody. The police in Capra claimed they had performed a routine inventory search, but the Court found this claim inconsistent with their search which was clearly directed toward discovering incriminating evidence. Nevertheless, the Court approved the search, stating:

> [i]f agents have probable cause to believe that a car is or has been used for carrying contraband, they may summarily seize it . . . and search it.
> [citations omitted]

Id., 501 F.2d at 280.

Since at the time of his arrest, Ochs had no proof of ownership of the blue Cadillac (indeed had supplied to police officers what appeared to be an altered registration certificate in the name of Otto Narday), the police had probable

cause to believe the car was stolen.

The New York legislature has provided that a policeman "shall have power to seize any motor vehicle . . . in the state where there is good reason to believe that such motor vehicle . . . has been stolen . . . " New York Vehicle & Traffic Law § 424(3) (McKinney 1970). The Second Circuit on numerous occasions has interpreted this statute to imply:

> that once the police have properly seized a car pursuant to a statute because they have reasonable grounds for believing it has been stolen, they have the authority to search the car without a warrant.

Zaicek, supra, 519 F.2d at 415. See also United States v. Ortega, 471 F.2d 1350 (2d Cir.), cert. denied, 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973); United States v. Ayers, 426 F.2d 524 (2d Cir.). cert. denied, 400 U.S. 842, 91 S.Ct. 85, 27 L.Ed.2d 78(1970); United States v. Francolino, 367 F.2d 1013, 1018-23 (2d Cir. 1966), cert. denied, 386 U.S. 960, 87 S.Ct. 1020, 18 L.Ed. 2d 110 (1967).

The Search of the Two Briefcases Was Clearly Lawful

[15] It is a fundamental proposition of law that a reasonable search conducted without a warrant and incident to a lawful arrest does not offend the fourth amendment to the Constitution and that a search incident to an arrest may extend to things within the immediate control of the accused. Chimel v. California, 395 U.S. 752 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); Beck v. Ohio, 379 U.S. 89,

85 S.Ct. 223, 13 L.Ed.2d 142 (1964). In this case, the two briefcases, the search of which Ochs challenges, were obviously within his control at the time of arrest and within easy reach.

In the past, this Court has applied a rule that a search that is purportedly lawful because it is incident to an arrest must be conducted substantially contemporaneous with the arrest. United States ex rel. Muhammad v. Mancusi, 432 F.2d 1046 (2d Cir. 1970), cert. denied, 402 U.S. 911, 91 S.Ct. 1391, 28 L.Ed.2d 653 (1971).

In United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), the Supreme Court eliminated such a requirement and held a search was lawful as incident to arrest even though it was conducted many hours after the accused was arrested. However, even under the rule that the search must be substantially contemporaneous with the arrest, the Second Circuit (and numerous other United States Circuit Courts of Appeals) have made it clear that the search need not occur at the exact time and place of arrest. United States ex rel. Muhammad v. Mancusi, supra; United States v. Frankenberry, 387 F.2d 337 (2d Cir. 1967); United States v. Miles, 413 F.2d 34 (3d Cir. 1969); Morris v. Boles, 386 F.2d 395 (4th Cir. 1967), cert. denied, 390 U.S. 1043, 88 S.Ct. 1640, 20 L.Ed. 2d 304 (1968); United States v. Moore, 477 F.2d 538 (5th Cir. 1973); Leffler v. United States, 409 F.2d 44, 48 (8th Cir. 1969); Cotton v. United States, 371 F.2d 385 (9th Cir. 1967); Malone v. Crouse, 380 F.2d 741 (10th Cir. 1967), cert. denied, 390 U.S. 968, 88 S.Ct. 1082, 19 L.Ed.2d 1174 (1968).

In United States ex rel. Muhammad v. Mancusi, supra, the Second Circuit in applying the substantially contemporaneous rule, held that a search of

APPENDIX B

a briefcase[8] of the accused, that would have been lawful at the spot of arrest, was just as lawful when done shortly after the arrest at FBI headquarters.

[16] In this case, it made eminent sense for the police officers to wait to search the suitcase until they arrived at their headquarters.

Under these circumstances, it is clear under both the standard set forth in the Mancusi case and the recent ruling of the Supreme Court in United States v. Edwards, supra, that the search of the two briefcases at the Midtown South Precinct and seizure of the books and records therein were proper as incident to the arrest of this defendant.

Conclusion

Ochs' suppression motion is denied in its entirety.

SO ORDERED:

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8. The recent Supreme Court case of United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed. 538 (1977) has no bearing on this case. The Second Circuit has already held that Chadwick is not to be applied retroactively. See United States v. Reda, 563 F.2d 510 (2d Cir. 1977) (on rehearing). The events of this inventory search preceded by almost two years the decision in Chadwick.

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of May, one thousand nine hundred and seventy-nine.

Present: HONORABLE WALTER R. MANSFIELD

HONORABLE THOMAS J. MESKILL

HONORABLE HENRY J. FRIENDLY

Circuit Judges.

UNITED STATES OF AMERICA, Appellee, v. GEORGE OCHS,. Appellant.	78-1163

A petition for a rehearing having been filed herein by counsel for the Appellant George Ochs

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO,
Clerk

APPENDIX D

ORDER EXTENDING TIME WITHIN WHICH
TO FILE PETITION FOR CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. A-1086

GEORGE OCHS,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 24, 1979.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 19th day
of June, 1979.

APPENDIX E

CONSTITUTIONAL, STATUTORY, AND

RULE PROVISIONS INVOLVED

UNITED STATES CONSTITUTION
AMEND. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FEDERAL RULE OF CRIMINAL PROCEDURE 8(a)

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offensee if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transactions connected together or constituting parts of a common scheme or plan.

FEDERAL RULE OF CRIMINAL PROCEDURE 12(b)

Pretrial Motions

Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

FEDERAL RULE OF CRIMINAL PROCEDURE 14

Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

UNITED STATES CONSTITUTION
AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 1503.

Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrates in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

26 U.S.C. § 7201.

Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7206.

Fraud and false statements

Any person who--

(1) Declaration under penalties of perjury.--Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

. . . .

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

APPENDIX F

ORDER DIRECTING REPLY TO DEFENDANT'S MOTION FOR RECONSIDERATION OF DENIAL OF REHEARING

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of July, one thousand nine hundred and seventy-nine.

Present: HONORABLE HENRY J. FRIENDLY
Circuit Judge.

UNITED STATES OF AMERICA,	:	(Filed July 2, 1979)
Appellee,	:	
v.	:	No. 78-1163
GEORGE OCHS,	:	
Defendant-Appellant.	:	

Counsel for appellant having served a notice of motion dated June 25, 1979 to set aside the order denying his petition for rehearing in light of the Supreme Court's decision in Arkansas v. Sanders, decided June 20, 1979, the United States is directed to file an answer to said

petition on or before July 9, 1979. The Government is directed to include in said answer a statement whether, if the court should now feel constrained to hold that the search discussed in Point I of the court's opinion and in the concurring opinion of Judge Meskill was illegal, the Government believes it would have sufficient untainted evidence to proceed with a retrial of Counts One, Two, Six and Seven.

/s/ Henry Friendly

United States Circuit Judge

APPENDIX G

MOTION FOR SEVERANCE, DATED JANUARY 11, 1978
IN UNITED STATES v. OCHS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed
Jan. 16, 1978

UNITED STATES OF AMERICA,

Plaintiff,

- against -

GEORGE OCHS, Etc.,

Defendant

NOTICE OF MOTION

77 Cr 775
IBC

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of ROBERT BLOSSNER, the attorney for the defendant herein, duly executed the 11th day of January 1978, the indictment herein, and on file with this Court, and upon all the proceedings and papers heretofore had herein, a motion will be made in the above designated court, before the Honorable Irving Ben Cooper, a Justice thereof, at the United States Courthouse, thereof, Foley Square, in the Borough of Manhattan, City and State of New York, at such time as the Court may designate, for an order pursuant to Rules 8 and 14

of the Federal Rules of Criminal Procedure, severing the counts of the indictment herein, based on alleged violations of the Internal Revenue Code, and directing that a separate trial be had thereon, together with such other further and different relief as to this Court may seem just and proper.

Dated: New York, New York
January 11th, 1978

Yours, etc.

ROBERT BLOSSNER
Attorney for Defendant
Office & P.O. Address
250 Broadway
New York, New York 10007